

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 LUIS MARIANO MARTINEZ, :

4 Petitioner :

5 v. : No. 10-1001

6 CHARLES L. RYAN, DIRECTOR, ARIZONA:

7 DEPARTMENT OF CORRECTIONS :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, October 4, 2011

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:05 a.m.

15 APPEARANCES:

16 ROBERT D. BARTELS, ESQ., Tempe, Arizona; on behalf of
17 Petitioner.

18 KENT E. CATTANI, ESQ., Chief Counsel, Criminal Appeals,
19 Phoenix, Arizona; on behalf of Respondent.

20 JEFFREY B. WALL, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting Respondent.

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ROBERT D. BARTELS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	KENT E. CATTANI, ESQ.	
7	On behalf of the Respondent	24
8	ORAL ARGUMENT OF	
9	JEFFREY B. WALL, ESQ.	
10	On behalf of the United States, as	42
11	amicus curiae, supporting Respondent	
12	REBUTTAL ARGUMENT OF	
13	ROBERT D. BARTELS, ESQ.	
14	On behalf of the Petitioner	51
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 case next in Case 10-1001, Martinez v. Ryan.

5 Mr. Bartels.

6 ORAL ARGUMENT OF ROBERT BARTELS

7 ON BEHALF OF THE PETITIONER

8 MR. BARTELS: Mr. Chief Justice, and may it
9 please the Court:

10 In Arizona almost all State and Federal
11 claims for relief from a criminal conviction are
12 raisable in the Arizona Court of Appeals on direct
13 appeal.

14 However, a claim that trial counsel was
15 ineffective must be presented first to a trial court in
16 what Arizona labels a post-conviction relief proceeding.

17 Petitioner agrees entirely with Arizona's
18 requirement that ineffective assistance of trial counsel
19 claims go initially to a trial court, and he does not
20 object to the label "post-conviction relief" as such.

21 The issue in the case has to do with
22 Arizona's insistence that Petitioner had no right to
23 counsel with respect to the post-conviction first-tier
24 review, portion of first-tier review, even though he did
25 have a right to counsel in the appeal portion of direct

1 review.

2 And our position is that that distinction
3 between what are two portions of the first opportunity
4 for review of a conviction, broken up sensibly but by
5 dictate of the State into two parts, that that
6 distinction cannot stand, especially in a case in which
7 the first post-conviction proceeding started and ended
8 before anything of substance happened in this --

9 JUSTICE GINSBURG: If your main position is
10 right, then wouldn't the same go for 2255 proceedings?
11 I mean, this Court has said it makes sense to have the
12 claims of ineffective assistance of counsel looked at by
13 a trial judge first, not an appellate judge, and yet in
14 2255 proceedings, if you are urging ineffective
15 assistance of counsel, you don't get an automatic right
16 to counsel. In 2255 proceedings, counsel will be
17 appointed only if the court determines that the
18 interests of justice so require. So the proposition you
19 are urging would have ramifications in the Federal
20 system as well, wouldn't it?

21 MR. BARTELS: That's correct, Your Honor.

22 JUSTICE GINSBURG: And so 2255 would no
23 longer be the interests of justice so require because if
24 it's your first opportunity to raise the point the court
25 must appoint counsel for you. Is that your view?

1 MR. BARTELS: In a situation -- The Federal
2 system is a little more complicated than Arizona, but
3 not much, because of Massaro.

4 JUSTICE GINSBURG: Because of the what?

5 MR. BARTELS: Our position would be in the
6 Federal system, if a Federal defendant wished to file a
7 2255, that he would be entitled to appointed counsel,
8 but as far as this case is concerned, only with respect
9 to any claim of ineffective assistance at trial.

10 JUSTICE ALITO: Do you want us to hold that
11 there is a right to counsel whenever a Petitioner
12 asserts a claim that could not have been asserted at an
13 earlier point in the proceedings?

14 MR. BARTELS: Yes, Your Honor, with the
15 caveat, if the State allows that kind of proceeding.
16 One of the things I have a hard time keeping track of in
17 this context is, unlike the right to counsel at trial,
18 the Sixth Amendment right, where I think they have to
19 give him a trial, we are dealing in a context where this
20 Court made clear well over 100 years ago that there
21 doesn't have to be any review at all. The State --

22 JUSTICE ALITO: That's a very far-reaching
23 proposition that extends well beyond claims of
24 ineffective assistance of counsel at trial, wouldn't it?

25 MR. BARTELS: Yes.

1 JUSTICE ALITO: If many years after someone
2 is convicted an allegation is made that the prosecution
3 failed to turn over exculpatory evidence and that the
4 information supporting the claim has just recently come
5 to light and could not have been previously discovered,
6 there would be a right to counsel there; wouldn't that
7 be the case?

8 MR. BARTELS: If the State -- if the State
9 provided that proceeding, that -- then the State would
10 not have to. The State could have statutes of
11 limitation or rules against excessive petitions that
12 could be extremely strict if they are concerned about
13 that.

14 JUSTICE GINSBURG: Why would it be excessive
15 if it could not have been raised earlier?

16 MR. BARTELS: Your Honor, as I understand
17 the situation, we've got newly discovered evidence of
18 perhaps a Brady violation. In that situation, if the
19 State provides a proceeding for review of that, and it
20 is the first opportunity for review, I think the
21 implication of Douglas and Halbert is -- there would be
22 a right to --

23 JUSTICE SCALIA: What if the State doesn't
24 but the Federal government does? I mean, what if you
25 say, there is no State habeas available; you go straight

1 to Federal habeas?

2 MR. BARTELS: I think that's correct, Your
3 Honor. In the Federal system --

4 JUSTICE SCALIA: So you haven't really given
5 us a solution for the States. They can't -- they can't
6 stop this thing. Right?

7 MR. BARTELS: Well, but the Federal system
8 itself has a statute of limitation, though I believe
9 that the statute would probably begin to run, in Justice
10 Alito's hypothetical, with the discovery of a Brady
11 violation. So the Federal courts have set up the
12 statute of limitations to accommodate that point. And
13 the States would be free to do that, too, if they wish.

14 JUSTICE GINSBURG: If you permitted this
15 counsel to raise a claim that could not have been raised
16 on the direct appeal, is the counsel limited to that
17 point, or can the counsel representing the client bring
18 up other things?

19 MR. BARTELS: No, Your Honor. The right to
20 counsel would apply only to the first-tier review issue.
21 And so, for example, if counsel finds other issues and
22 wants to pursue them, the State could say: We're not
23 going to pay you for those.

24 JUSTICE GINSBURG: But could it be that the
25 counsel could also bring up a Brady claim, a newly

1 discovered evidence? It wouldn't be limited to
2 ineffective assistance of counsel?

3 MR. BARTELS: The holding in this case won't
4 be so limited, but I would agree that Douglas and
5 Halbert would imply that Brady, at least many Brady
6 claims, would be such that the 2255 or the State post-
7 conviction would be the first opportunity to present.

8 JUSTICE ALITO: What if the -- I'm sorry.
9 What if the ineffective assistance of counsel claim is
10 closely related to other claims that Petitioner wants to
11 raise in an initial post-conviction relief proceeding?
12 Counsel at trial was ineffective for failing to do A, B,
13 C and D, and all of those are bases for relief. And now
14 I want to argue with new counsel in the first post-
15 conviction proceeding not only that counsel was
16 ineffective at trial, but also that all these other
17 claims are meritorious.

18 Are you saying that the counsel to whom the
19 Petitioner has a right is limited to making only the
20 ineffective assistance of counsel claim and cannot go on
21 and represent the Petitioner on these other claims?

22 MR. BARTELS: I'm saying, Your Honor, that
23 the State does not have any duty to pay the lawyer in
24 those circumstances.

25 Now, the kind of situation you are talking

1 about I think is most likely to come up where --

2 JUSTICE GINSBURG: It's not a question of
3 pay. I think Justice Alito was asking, counsel says:
4 I've got a duty to represent my client zealously, so I
5 want to bring up not only ineffective assistance of
6 counsel, but these other matters.

7 MR. BARTELS: Your Honor, I think the
8 appointment could be limited to the first-tier review.

9 CHIEF JUSTICE ROBERTS: I'm sorry. I don't
10 understand how that works. The claim is, say for
11 example, you were ineffective because you didn't raise a
12 Batson claim. Surely he gets to review the Batson claim
13 once he establishes the effectiveness --

14 MR. BARTELS: Yes, Your Honor, and in fact
15 in that example pursuing the ineffective assistance
16 claim requires pursuing the Batson claim.

17 CHIEF JUSTICE ROBERTS: So the lawyer -- the
18 State would be required to provide counsel not simply to
19 raise the threshold ineffectiveness argument, but to go
20 ahead and raise the arguments as to which he was
21 ineffective.

22 MR. BARTELS: Well, Your Honor, in the
23 situation in which the ineffectiveness of counsel is
24 based on the failure to make a Batson claim, the failure
25 to make an objection at trial, I would agree with you,

1 absolutely.

2 In my experience --

3 JUSTICE SCALIA: What about other claims
4 that don't follow on? I mean, other claimed errors in
5 the trial? You say the State doesn't have to pay for
6 that representation. Does counsel keep time sheets
7 on --

8 MR. BARTELS: Yes, Your Honor.

9 JUSTICE SCALIA: -- on the various issues,
10 12-minute intervals?

11 MR. BARTELS: Yes, Your Honor.

12 JUSTICE SCALIA: And the State pays for some
13 issues and not for other issues?

14 MR. BARTELS: Absolutely, Your Honor. It
15 happens routinely in the State system. The appointed
16 counsel have to submit detailed billing statements.

17 JUSTICE SOTOMAYOR: How does this work now,
18 counsel? How are you proposing this work? Right now in
19 the Federal system a pro se litigant comes in and says:
20 I have an ineffective assistance of counsel claim. Most
21 district courts say, ask the attorney to submit an
22 affidavit, and then decides whether on the face of the
23 claims there is reason to appoint counsel and hold a
24 hearing. Under your theory, every State would be
25 obligated to appoint counsel ab initio to check out

1 whether there is the potential for an IAC claim?

2 MR. BARTELS: Well, I think the States could
3 run this in different ways. The way in which Arizona
4 does it makes sense to me, which is that the -- there is
5 a form, Form 24-B. It's a very simple form. It doesn't
6 require stating any substantive grounds. It really just
7 says: I would like to challenge my conviction through
8 post-conviction relief, in the very same way that
9 notices of appeal --

10 JUSTICE SOTOMAYOR: So what you are
11 essentially saying, every State is obligated to appoint
12 an attorney on the first leg?

13 MR. BARTELS: Every State is obligated to
14 treat these, what are really parts of the appeal, the
15 initial appeal, the same way they do the rest of the --

16 JUSTICE SOTOMAYOR: Counsel, there is a huge
17 reliance interest that has developed since Finley and
18 its progeny, and States don't routinely appoint
19 post-conviction counsel.

20 MR. BARTELS: I --

21 JUSTICE SOTOMAYOR: What are we going to do
22 about that reliance interest and the burdens on States?

23 MR. BARTELS: Well, Your Honor, I -- I guess
24 I would say two things about that. One, there are a
25 fair number of States that do appoint counsel routinely

1 on request. Arizona is one.

2 JUSTICE SOTOMAYOR: Well, I know -- I know
3 for a fact that most do in capital cases. But I don't
4 know if that's the same figure for non-capital cases.

5 MR. BARTELS: I don't know the percentage,
6 Your Honor, but I know there are several States.

7 JUSTICE BREYER: I don't understand. Could
8 you answer the original question that Justice Sotomayor
9 asked? She said: What happens in Arizona? You said a
10 prisoner, or defendant, he has been convicted, gone
11 through his first round of appeal. He is given a form,
12 which you said was a simple form, do you want to proceed
13 in collateral review? And he answers yes. Then does
14 Arizona appoint a lawyer or not?

15 MR. BARTELS: Yes.

16 JUSTICE BREYER: All right. Then what are
17 we arguing about? He had his lawyer.

18 MR. BARTELS: He didn't have an effective
19 lawyer.

20 JUSTICE BREYER: Ah, so now you are talking
21 about the second round. You are talking about does he
22 have a right to a lawyer when he wants to claim that the
23 first lawyer that they gave him on collateral review was
24 ineffective?

25 MR. BARTELS: No, Your Honor, that is not

1 the issue in this case.

2 JUSTICE BREYER: What is the issue?

3 MR. BARTELS: The issue in this case is
4 whether the ineffectiveness of the first post-conviction
5 counsel constitutes cause to excuse the --

6 JUSTICE BREYER: All right. So why --
7 that's what I thought, actually; and I don't understand
8 what all the briefs are about, and I must be missing
9 something, about whether they are all going to have to
10 appoint lawyers or not in these different States. It
11 seems to me that has nothing to do with this case.

12 This case comes out of a State that does
13 appoint lawyers and the question is whether you, your
14 client, should have from your point of view at least one
15 full, effective chance to say, every lawyer I have been
16 appointed, I've gotten 100 and they are all terrible,
17 and -- or whether the State can block that from being
18 heard in habeas, by saying, oh, no, we gave him 19 and
19 the claim that all 19 were ineffective, he can't even
20 raise. That's the issue, is that it?

21 MR. BARTELS: Well, Your Honor, we are
22 actually, once we take it past two, I -- I'm not on
23 board with the hypothetical.

24 JUSTICE BREYER: No, no, no -- but I'm not
25 -- I'm not ridiculing as it sounded your claim. I'm

1 saying maybe that's right. Maybe he's not going to win
2 the claim, probably; but the question is, if his claim
3 is in Federal habeas, I have gotten 102 lawyers in 102
4 proceedings and every one of them was absolutely
5 ineffective, perhaps that habeas judge has to look at it
6 and say oh, I see, he's claiming he never had one full
7 effective chance to claim that his trial lawyer was
8 ineffective because the other 19 was just as bad -- I
9 have to look at it if I'm a trial judge.

10 Now, that is not a silly argument in my
11 opinion; that could be a winning argument. I just want
12 to know is that basically your argument?

13 MR. BARTELS: No, Your Honor.

14 JUSTICE BREYER: Okay.

15 MR. BARTELS: That is not my argument.

16 JUSTICE BREYER: Now let's start at ground
17 zero, sorry. Everyone else --

18 (Laughter.)

19 JUSTICE ALITO: Why isn't that where your
20 argument leads, to the proposition that you can never
21 procedurally default irrevocably an ineffective
22 assistance of counsel claim?

23 MR. BARTELS: Well, Your Honor, on a
24 theoretical level, I don't think this Court's decisions
25 in Douglas and Ross and Halbert give us a clear answer

1 about whether there's a right to effective assistance of
2 second post-conviction counsel --

3 JUSTICE KENNEDY: But we want to know what
4 rule you are advocating in this case.

5 MR. BARTELS: I --

6 JUSTICE KENNEDY: We want to know why you
7 are not advocating for what Justice Breyer and Justice
8 Alito indicate is an endless right to claim that all
9 previous counsel were ineffective. You say oh, no, you
10 are not arguing that. What is the rule that you are
11 arguing for? What limiting principle do you have so
12 that we do not have an endless right of counsel?

13 MR. BARTELS: Well, Your Honor, the -- the
14 theory that you get counsel for first-tier review limits
15 it to that first tier, because when you go after the
16 effectiveness of the -- of the first post-conviction
17 counsel, that is necessarily going to involve review of
18 the effectiveness of trial counsel.

19 JUSTICE KENNEDY: But -- I understand that.
20 But what is it that prevents the Petitioner from saying
21 that the first counsel in the collateral proceeding was
22 ineffective and that so was the second?

23 MR. BARTELS: Your Honor, I don't think
24 there is a right to a counsel and therefore not a right
25 to effective counsel in the second --

1 JUSTICE BREYER: But you can -- you can have
2 a -- you don't have to give him a counsel. Look, the
3 State did give him a counsel on first collateral review;
4 that counsel was supposed to, according to him, raise
5 the claim, my trial counsel was no good.

6 Now we go to the next round. The State
7 says: I'm sorry, you are on your own here; we are not
8 giving you a lawyer anymore. Okay. That may count. He
9 now has to know he has to make the argument himself.
10 And therefore he goes and makes the argument himself,
11 and now he's in habeas and he can argue they got it all
12 wrong. He's not blocked.

13 MR. BARTELS: That's correct.

14 JUSTICE BREYER: All right. So what --
15 there isn't an issue in this case about giving people
16 counsel, on that view. There is an issue about if you
17 do give them counsel, then they have to be able to have
18 an argument later that you did it ineffectively. That's
19 a different matter; that's a question of whether you are
20 blocked in habeas and can't even make the claim.

21 All right, forget it. I will ask the other.

22 MR. BARTELS: Well, Your Honor, I think I'm
23 on the same page with that example.

24 JUSTICE BREYER: Yeah, okay.

25 JUSTICE ALITO: But there can't be a

1 claim --

2 JUSTICE KENNEDY: Can I leave this argument
3 with the judgment that you have offered me no limiting
4 principle on how many proceedings there must be --

5 MR. BARTELS: Well --

6 JUSTICE KENNEDY: -- before there's an end
7 to the argument that previous counsel were inadequate?

8 I understand, this is the -- in this case it
9 was the first counsel in -- in the first collateral
10 proceeding that we are talking about. But why couldn't
11 it be the second? You don't give us a limiting
12 principle.

13 MR. BARTELS: Well, Your Honor --

14 JUSTICE KENNEDY: And if you want to say
15 there shouldn't be, then that's fine.

16 MR. BARTELS: No, Your Honor, there
17 shouldn't. And the merits -- the Petitioner's merits
18 brief devoted quite a few pages to both the theoretical
19 problems with the infinite continuing of litigation and
20 the practical limitations.

21 And let me -- let me turn to the practical
22 ones.

23 JUSTICE KAGAN: So Mr. Bartels, before you
24 do that, I mean, I understood you to be saying that you
25 would draw a line after the first post-conviction

1 proceeding; is that correct?

2 MR. BARTELS: Yes, that's correct.

3 JUSTICE KAGAN: And the briefs go back and
4 forth as to whether that line -- you know, what lies
5 behind that line. But you would draw the line there?

6 MR. BARTELS: Yes, Your Honor,
7 theoretically. And the State has the wherewithal, given
8 McKane, to draw the line anywhere it pleases. It could
9 just say you get one post-conviction.

10 JUSTICE ALITO: What I understand you to be
11 saying is exactly that. A line has to be drawn
12 somewhere; enough is enough; it can't go on forever.

13 MR. BARTELS: Yes.

14 JUSTICE ALITO: And the sensible place to
15 draw the line in your view is after the first-tier
16 review; that's your argument, right?

17 MR. BARTELS: Yes, Your Honor, because I --

18 JUSTICE ALITO: The problem with that is you
19 can answer that by saying: Yes, we have to draw a line
20 someplace and the Court has already done that, and it
21 did it in Douglas and it was after first tier of review
22 on direct appeal. It's exactly the same argument,
23 except where the law stands now the line is drawn at a
24 different place on the same principle. It has to be
25 drawn someplace.

1 MR. BARTELS: Well, Your Honor, that
2 principle doesn't work very well in a system like
3 Arizona's where you can't bring this one claim on the
4 direct appeal, and you can -- and Mr. Martinez, well,
5 couldn't -- you can file your first post-conviction and
6 litigate it while the appeal is pending before it's
7 final.

8 CHIEF JUSTICE ROBERTS: So you would be
9 happy with a system that said, no, you don't have to
10 raise it in collateral review, you have to raise it on
11 direct appeal, which is very unworkable, because if you
12 are arguing ineffective assistance of counsel in a
13 direct proceeding, presumably it's usually the same
14 counsel; he's not likely to bring the claim. That would
15 be worse for criminal defendants than the system --

16 MR. BARTELS: Well --

17 CHIEF JUSTICE ROBERTS: -- that's there now.

18 MR. BARTELS: No, Your Honor. The -- if
19 direct appeal is now going to encompass possible claims
20 of ineffective assistance, you are not going to be able
21 to have the same counsel on appeal.

22 CHIEF JUSTICE ROBERTS: Well, but the person
23 who decides what arguments you are going to make on
24 appeal is usually the person who handled the trial in
25 these types of cases.

1 MR. BARTELS: Well, Your Honor, that's not
2 true in Arizona.

3 CHIEF JUSTICE ROBERTS: In Arizona, the
4 usual case in criminal cases is that somebody else
5 handles the appeal on direct proceedings?

6 MR. BARTELS: It may be from the same
7 office. But I agree that that would have to change if
8 ineffective assistance of counsel were part of the
9 direct appeal.

10 And the other thing that would have to be
11 done -- and this is done in some States -- is that you
12 have to raise it in direct appeal, but most -- as this
13 Court recognized in Massaro -- most ineffective
14 assistance claims cannot be dealt with on direct appeal
15 because of a lack of evidence. They need more evidence.

16 JUSTICE SCALIA: Ineffective assistance of
17 appellate counsel certainly can't be dealt with on
18 direct appeal; right?

19 MR. BARTELS: No, that's correct.

20 JUSTICE SCALIA: So even if you get a
21 different counsel to -- to take the appeal, you could
22 always claim that that counsel was ineffective in
23 habeas, right?

24 MR. BARTELS: Your Honor, I -- two things
25 about that. First of all, the State does not have to

1 provide the review of the effectiveness of appellate
2 counsel. If it does so, I would still say that that's
3 going to end up having to be second opportunity review
4 of the claims that appellate counsel failed to raise.
5 That's got to be the basis for --

6 JUSTICE ALITO: If there is a right to
7 counsel whenever someone asserts a claim that couldn't
8 have been raised earlier, why does the State not have
9 the obligation to provide counsel to contest the
10 constitutionality of the representation that was
11 provided on appeal?

12 MR. BARTELS: Well, Your Honor, the -- the
13 reason is that -- in terms of this first tier, second
14 tier analysis from Douglas and Halbert, you are not
15 going to be able to look at the effectiveness of
16 appellate counsel without looking at the issue of
17 prejudice. And that's going to require what is second
18 opportunity review of the merits of the claim that the
19 appellate lawyer didn't raise. But that's the second
20 opportunity for that review, because the direct appeal
21 was the first opportunity.

22 I think in the end, though, just a Mathews
23 v. Eldridge procedural due process analysis works
24 better. And the critical factor is what's the risk of
25 an error in the absence of counsel?

1 Well, the first time around, the risk of
2 your -- involves the probability that the trial judge
3 made a mistake that's prejudicial. By the time we get
4 to the post-conviction challenging appellate counsel's
5 effectiveness, now it's the probability that the trial
6 judge was wrong and that the appellate lawyer was wrong.
7 And so it's exponentially lower -- that at least
8 provides a basis for --

9 JUSTICE ALITO: A trial judge doesn't have
10 to be wrong for there to be ineffective assistance of
11 counsel claim at trial?

12 MR. BARTELS: No. No. I'm sticking with
13 the example of ineffective assistance of appellate
14 counsel. Trial counsel -- I'm sorry.

15 JUSTICE KAGAN: I was wondering what you
16 would say -- some of these statistics is just that these
17 claims succeed very, very rarely. So by the analysis
18 that you just used, this kind of balancing analysis, why
19 we should even go so far as you would have us go?

20 MR. BARTELS: Well, Your Honor, it would be
21 because Douglas and Halbert have done that balancing in
22 saying that in this situation, the first tier review,
23 the probability of an incorrect result without counsel
24 is sufficiently high that there should be counsel. And
25 that's really the disagreement between Justice Douglas

1 and Justice Harlan in Douglas. Justice Harlan didn't
2 think the lawyers mattered --

3 JUSTICE GINSBURG: So the -- post-conviction
4 application would go to the trial judge; right? And on
5 the --

6 MR. BARTELS: Yes, Your Honor.

7 JUSTICE GINSBURG: So both in the trial
8 judge with this Anders type speech that doesn't raise
9 ineffective assistance of counsel, but it's such an
10 obvious claim to make that when the -- when the judge
11 reviews that brief, if the trial judge thought that this
12 defendant was abysmally represented, wouldn't --
13 wouldn't the Court say, sorry, I'm not going to accept
14 this Anders speech. It seems to me you -- there was
15 enslavement -- ineffective assistance of counsel, and
16 you should raise that. That's a viable issue, so I'm
17 not going to accept your briefs.

18 MR. BARTELS: I think there would be
19 something like that with the right to counsel for these
20 ineffective assistance of trial counsel claims.

21 JUSTICE GINSBURG: If the judge reviews the
22 Anders review of ineffective assistance of counsel
23 claims, a valid one, the judge would have spotted these
24 issues, and it would have been -- it would have been
25 argued on that first --

1 MR. BARTELS: Are we talking about the
2 Martinez case itself?

3 JUSTICE GINSBURG: Yes. If -- in the
4 Martinez case, there was an Anders brief, right?

5 MR. BARTELS: There was, Your Honor, but it
6 was nothing but a summary of the trial transcript, and
7 provides no basis for the trial court -- the problem
8 with ineffective --

9 JUSTICE GINSBURG: Doesn't the trial court,
10 I mean the excuse -- the excuse of counsel is not
11 automatic, the trial judge has to look at it and say,
12 no, there is -- there's no issue for you to pursue, so
13 I'm going to excuse you.

14 MR. BARTELS: Well, under the current
15 system, the trial judge has no duty to make any Anders
16 determination because the Arizona courts have upheld
17 there is no right to effective appointed counsel.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Cattani?

20 ORAL ARGUMENT OF KENT E. CATTANI

21 ON BEHALF OF THE RESPONDENT

22 MR. CATTANI: Mr. Chief Justice, and may it
23 please the Court:

24 I would like to focus on three points.
25 First, petitioner is advocating a significant change to

1 this Court's jurisprudence that does implicate the
2 State's reliance interest on Finley and Giarratano.

3 It's not a minor change --

4 JUSTICE KAGAN: Mr. Cattani, can I ask about
5 your interests here, because your State is one that does
6 appoint counsel. So you already have the costs there.
7 I'm just wondering, in your brief, you talk a lot about
8 the excessive costs that this would impose on you. And
9 I'm just wondering where those costs come from if you
10 appoint counsel already. And I know some other States
11 are in a different situation, but as to you, where do
12 the costs come from?

13 MR. CATTANI: I think they come primarily
14 from the logical extension of the rule that would
15 require a second post-conviction proceeding to eliminate
16 the claims of ineffective assistance of post-conviction
17 counsel. Right now, those claims are routinely rejected
18 under Finley and Giarratano because there is no
19 constitutional right to counsel. Under the theory
20 and -- I don't think there's really been advanced a
21 principled basis for limiting the rule that's been
22 advanced, and certainly --

23 JUSTICE KAGAN: Well, if we just said there
24 is, you know, we can only draw a line in this context
25 and we're going to draw the line here, and this is where

1 it sticks. What are the additional costs to you?

2 MR. CATTANI: The additional costs would be
3 implicated with a second post-conviction proceeding.

4 JUSTICE SOTOMAYOR: Well, it's only a cost
5 if that second counsel, however its secured, can
6 actually make a credible or sustainable claim that
7 appellate counsel, the first tier counsel, was
8 ineffective.

9 MR. CATTANI: I think it's -- if the nature
10 of ineffective assistance claims, they are easy to raise
11 and difficult to litigate. It's -- it's not difficult
12 to raise -- to assert ineffective assistance. It's very
13 obvious in capital cases where an assertion is my
14 attorney was ineffective at sentencing for failing to
15 raise --

16 JUSTICE SOTOMAYOR: Federal courts handle
17 them routinely.

18 MR. CATTANI: Pardon me?

19 JUSTICE SOTOMAYOR: Federal courts handle
20 them routinely on papers, and most of them are denied.
21 Is the State system different? Where first level
22 counsel, appellate counsel, post-conviction counsel
23 raises ineffective assistance of trial counsel. How
24 many of those cases end up in hearing?

25 MR. CATTANI: I don't -- I don't have the

1 statistics. They do not generally result in -- in
2 evidentiary hearings.

3 JUSTICE SOTOMAYOR: Exactly. Very few.

4 MR. CATTANI: In noncapital cases.
5 Certainly in capital cases, I think the majority do.

6 JUSTICE SOTOMAYOR: Can I go back to just
7 clarify the record for a second? What authorized Levitt
8 to file the post-conviction relief motion? Wasn't he
9 appointed simply to prosecute the direct appeal?

10 MR. CATTANI: At hearing, Levitt was
11 appointed to prosecute the direct appeal.

12 JUSTICE SOTOMAYOR: What gave him the
13 authority to file the 32 motion? Obviously, he didn't
14 seek his client's approval because the client when he
15 received it said: I don't understand what you are
16 saying; I only speak Spanish. So what gave Levitt the
17 authority to do what she did?

18 MR. CATTANI: Well, she was representing
19 Emitz and Martinez, and the rules allow the filings of
20 both convictions petitions.

21 JUSTICE SOTOMAYOR: By an attorney appointed
22 just on the direct review?

23 MR. CATTANI: Well, I don't think there is
24 anything that would prevent her from representing him in
25 a number of different ways. If she saw something that

1 she thought needed to be raised in a post --

2 JUSTICE SOTOMAYOR: So what would have
3 been -- what was the tactical advantage of doing what
4 she did? What conceivable reason was there for her to
5 file the rule 32 motion before direct review finished?

6 MR. CATTANI: I don't know that there was
7 necessarily a tactical reason. The reason would be in
8 some cases that if an attorney views the case as having
9 a potentially meritorious issue on post conviction, you
10 get relief earlier.

11 JUSTICE SOTOMAYOR: Well, you know that she
12 didn't. So answer my question. What reason did Levitt
13 have, strategic or otherwise, to file the rule 32
14 motion?

15 MR. CATTANI: I don't know that she had one.
16 But there was some indication in the record that there
17 was some evidence that she wanted to raise an issue that
18 the victim's diary would have contained some exculpatory
19 information, and that would have been something that
20 would have had to have been developed in a post-
21 conviction brief.

22 JUSTICE SOTOMAYOR: But she files
23 essentially an Ander's brief that says: I don't see
24 anything. What was the strategic reason for doing that?
25 What conceivable strategic reason?

1 MR. CATTANI: If she thought that there
2 would be a claim, that after looking at it further,
3 decided that the claims were not tolerable is, I think,
4 what happened in this instance.

5 CHIEF JUSTICE ROBERTS: Is it routine, or
6 does it happen often that lawyers who perceive a trial
7 issue that can only be raised on collateral review to
8 think that it makes sense to raise that right away so
9 that the appeal -- and then the appeal is delayed until
10 that's resolved?

11 MR. CATTANI: It is what happened in
12 Arizona. Frequently, prior to the Spreitz decision.
13 And historically counsel was allowed -- counsel were
14 allowed to raise claims of ineffective assistance and
15 stay the appeal. And that was the practice previously.
16 So it is not necessarily unusual that an attorney
17 reviewing the record might decide that there are some
18 issues that could be raised in post conviction.

19 JUSTICE BREYER: All right. This is not --
20 We will say this is my argument. I don't want to make
21 this your friend's argument.

22 In Arizona there was a trial, and the
23 defendant thinks trial counsel was inadequate. Then
24 there was a collateral review, and Arizona appoints a
25 lawyer for that. And after that, the Arizona courts

1 thought, no, he was adequate at trial. This particular
2 defendant wants to say that that lawyer was inadequate,
3 too. In fact, it was the same one. Hardly surprising.
4 That's his view. Now when he makes that argument in
5 Federal court, I guess he's going to be met with the
6 claim, since Arizona didn't have to appoint the lawyer
7 for collateral review, it doesn't matter what that
8 lawyer does. Is that right?

9 MR. CATTANI: Well, I think it's better
10 viewed through the lens of procedural due process. We
11 are looking at what are the procedures that are
12 available to a defendant to raise a claim of ineffective
13 assistance of trial counsel. One of the ways that you
14 can do that, that certainly goes a long way to
15 satisfying procedural due process, is appoint counsel.
16 It could be accomplished without appointing counsel,
17 certainly having somebody --

18 JUSTICE BREYER: Don't guess where I'm going
19 here. Maybe nobody wants to go there. Just follow the
20 questions. The question is, if he tries to make the
21 claim he does, want to say that my first lawyer was no
22 good at trial, and my second lawyer, who by coincidence
23 was the same in the collateral proceeding, was no good
24 either, then the State comes in and says: You can't
25 make that argument now because we had a proceeding

1 called the collateral review proceeding; we didn't have
2 to give you a lawyer there. But even if that lawyer was
3 inadequate, you lose because we didn't have to give you
4 one. Am I right about that? That's all I want to know.

5 MR. CATTANI: Well, I think you're -- you're
6 not right from the standpoint that we do have to provide
7 procedural due process. And the question is whether
8 that was enough.

9 JUSTICE BREYER: All right. You know. I'll
10 answer it. You say that is enough to give him a lawyer.
11 Okay? It is enough. But you have to give him an
12 adequate lawyer if you give him one. If you give him
13 one. You don't have to give him one. But if you give
14 him one, it has to be adequate. Now what about that?

15 MR. CATTANI: Well, I think that goes well
16 beyond this Court's previous --

17 JUSTICE BREYER: But would that is done.
18 But that's where I think we are at. Now why not say
19 this, that every defendant has to have one fair shot at
20 claiming, they can make the claim that his trial lawyer
21 was inadequate. And the State doesn't have to give him
22 the lawyer at collateral review; but if it does, then
23 that lawyer, he can say, couldn't make that claim
24 because he was inadequate. So you say, fine, they can
25 make that argument in habeas. I bet they never win.

1 But somebody might. He can make it. So what would
2 happen would be that the habeas judge in Federal habeas
3 would read the piece of paper. He'd say: What's the
4 ground for thinking this, and then he would make his
5 normal kinds of judgments.

6 Now what is -- Is there anything wrong with
7 that view? Is it absolutely blocked by precedent? It
8 seems to me it would relieve the concerns of the states
9 about worrying about having to appoint a lot of lawyers,
10 and it gives him a fair shot to make his argument.

11 MR. CATTANI: I think it is blocked by
12 precedent, certainly by F and Giarratano.

13 JUSTICE BREYER: Because?

14 MR. CATTANI: The problem with just shifting
15 -- because this Court has said that there is no right to
16 counsel and thus no right to the effective assistance of
17 counsel, and --

18 JUSTICE BREYER: Well, that's where you
19 would have to make the exception. You'd say: If you
20 give him a counsel, he does have the right to an
21 effective assistance of counsel insofar as the
22 ineffectiveness would prevent him from raising a claim
23 that to be fair the trial itself has to be -- he has to
24 have that about the trial itself. Without exception, it
25 would be that exception. Now is there something in

1 those cases that blocks that exception?

2 MR. CATTANI: Well, I think it does create
3 an infinite continuum.

4 JUSTICE BREYER: Well, in a sense it does,
5 but he's never going to win the infinite continuum.

6 MR. CATTANI: But the other problem with it
7 is --

8 JUSTICE BREYER: You never have to give him
9 a lawyer at all.

10 MR. CATTANI: That's correct, but if you
11 don't, then the problem is you shift over to Federal
12 court, and on Federal habeas you are then in the
13 position of litigating claims that are untethered to any
14 State court decision. And when we talk about whether
15 it's blocked by current precedent, certainly under
16 Edwards v. Carpenter to allege ineffective assistance as
17 cause to overcome a procedural default, there is a
18 requirement that you litigate that claim in State court.

19 JUSTICE ALITO: The question is whether
20 there is cause external to Petitioner to overcome
21 procedural default. If you went down that road, with
22 Petitioner representing himself or herself, not have to
23 show that: I would have raised a claim of ineffective
24 assistance of trial counsel and I would have won on that
25 were it not for the fact that the State appointed

1 counsel for me and led me astray and prevented me from
2 raising this meritorious argument. Isn't that where
3 that would have to go?

4 MR. CATTANI: Well, I think it would, but
5 it's even more problematic here in that the procedure is
6 that the attorney files a notice, gives a notice to the
7 defendant that she's been unable to find any tolerable
8 claims and gives the defendant an opportunity to file
9 his own pleading. So it's somewhat illogical to think
10 that if we just grant a second post-conviction
11 proceeding that the defendant is going to be in any
12 better position than he's in, in this type of situation
13 where he's advised that the attorney says that, as is
14 routinely the case, I am unable to find tolerable
15 claims, and then the defendant is given an opportunity
16 to file his own petition.

17 JUSTICE GINSBURG: And how much time in the
18 procedure you described, when appointed counsel does
19 inform Martinez: I'm not bringing up any claims for
20 you, so if you want to pursue relief you have to do so
21 on your own.

22 How much time does the defendant have? How
23 much time remains?

24 MR. CATTANI: I don't recall the specific
25 time. I believe it is in the brief. I'm sorry, I don't

1 recall the number of days that were remaining. But
2 certainly a defendant can request additional time if the
3 period of time is very short at that point. Extensions
4 are routinely granted in those circumstances.

5 JUSTICE KAGAN: Mr. Cattani, if you handled
6 this through the regular appeals process, the person
7 would receive the benefit of counsel. Is that correct?
8 Rather than shuttle this over to the post-conviction
9 review process?

10 MR. CATTANI: Well the person --Here he
11 received the benefit of counsel because it's appointed
12 in Arizona. He receives the benefit of counsel. If
13 your question is: Would he be entitled to the effective
14 assistance of the attorney developing that record?

15 JUSTICE KAGAN: Yes, exactly right.

16 MR. CATTANI: I don't think so necessarily.
17 I think that's a different. I think of the attack on
18 the effectiveness of collateral review of trial counsel
19 is itself a collateral attack. And I think under Finley
20 and Giarratano, and I think the distinction this Court
21 has drawn between direct review and collateral attack is
22 one that should be maintained. And in theory --

23 JUSTICE KENNEDY: But those -- those were --

24 JUSTICE KAGAN: Try --

25 JUSTICE KENNEDY: -- cases in which you

1 could not raise -- pardon me, in which you could raise
2 the particular issue at hand. But that's not this case.

3 MR. CATTANI: Well, I don't think it's
4 ever --

5 JUSTICE KENNEDY: The question is whether or
6 not the rationale of those cases, which you state
7 correctly, is applicable to a different set of
8 circumstances.

9 MR. CATTANI: Well, I'm -- I'm not sure I'm
10 following, because I think the procedure that errs on
11 the following is -- is something that was in place at
12 the time of Finley and Giarratano. What -- what Arizona
13 does is not extraordinary; it really follows what has
14 been recommended in Massaro, that -- that claims
15 relating to --

16 JUSTICE KENNEDY: But -- but those were,
17 correct me if I'm wrong, cases -- those were not cases
18 in which the issue could only be raised on collateral.

19 MR. CATTANI: Well, I think in -- in Massaro
20 this Court noted that it -- it would be rare for any --
21 for any -- for a defendant to be entitled to relief on a
22 claim that could be raised on direct appeal.

23 JUSTICE KAGAN: Well, Massaro indeed said
24 there are good reasons for withdrawing this issue and
25 putting it in a different kind of process. So suppose

1 the State does this, and some States do it: they say on
2 -- in the direct appeal process, we are going to remand
3 this issue back to the trial court because the trial
4 court is going to be fast and can make an evaluation.
5 That's part of the direct appeal process, this -- this
6 remand. Would the person then be entitled to effective
7 assistance of counsel?

8 MR. CATTANI: That's -- it's a difficult
9 question. I -- I don't think they would, because I
10 think it's still a collateral proceeding to address the
11 -- the effectiveness of trial counsel.

12 JUSTICE KAGAN: Even though now it's part of
13 the regular appeals process. It's just the way --
14 because of the issues that we recognized in Massaro, the
15 State has decided to structure things in this way?

16 MR. CATTANI: Well, I think more important
17 than the -- than the label that's been put on it is the
18 nature of the -- of the argument that's being advanced,
19 and it's a collateral attack, whether it -- whether the
20 State choose to call it as part of the appeal. What
21 happened in Arizona previously was that it would be --

22 JUSTICE KAGAN: So now you are creating a
23 different rule. You are saying anything which somebody
24 determines is appropriately raised as a collateral
25 attack, even if there's been no first review of that

1 question, there is no entitlement to counsel?

2 MR. CATTANI: Well, I think that's the --
3 the logical extension of what this Court announced in
4 Finley versus -- Finley and Giarratano, that we -- we've
5 drawn this distinction between --

6 JUSTICE KAGAN: Well, I don't think as
7 Justice Kennedy says that we ever really considered that
8 question in Finley and Giarratano, because we were
9 assuming there that all the things had been through the
10 appeals process.

11 MR. CATTANI: But I guess I'm not certain
12 that the timing would -- would make a difference of
13 when -- of whether you had a direct appeal first or
14 whether the collateral proceeding occurs first. In
15 either case the collateral proceeding is a
16 non-record-based attack on the conviction as opposed to
17 the direct review which is a record-based review of the
18 conviction. So that the timing I don't think is as
19 important as the nature of what's happening; it's a
20 non-record based attack on the conviction.

21 JUSTICE KENNEDY: Well, Justice Kagan's
22 question indicates that there are States, as you know,
23 where on direct appeal they can allow for an evidentiary
24 hearing on IAC. And as I understand your answer, is if
25 that happens the proceedings that precede the resolution

1 of the issue on direct appeal, being probably conducted
2 by the same counsel who is taking the direct appeal, can
3 be conducted and he can be -- and the counsel, he or she
4 can be inadequate in the conduct of those further
5 inquiries. That seems to me very strange.

6 MR. CATTANI: Well, I don't think we are
7 suggesting that would be the desired outcome. And --
8 it's simply that drawing the distinction between
9 collateral --

10 JUSTICE KENNEDY: You are suggesting that
11 there is no constitutional right to effective assistance
12 of counsel on direct, when he conducts some
13 supplementary proceedings. That's very strange.

14 MR. CATTANI: I guess the suggestion is that
15 it's a collateral, that's a collateral proceeding. If
16 you stay the proceeding and go back and address
17 ineffective assistance that that would essentially be a
18 collateral proceeding.

19 JUSTICE SOTOMAYOR: You mean -- that makes
20 no sense to me. That happens quite frequently on direct
21 appeal where a variety of issues are raised and the
22 court -- the circuit court or the appellate courts send
23 it back to trial counsel to develop the record further.
24 Your position is every time there is a sending back,
25 that stops the need for effective counsel?

1 MR. CATTANI: If they've sent something back
2 for a new hearing, I think that's something different.
3 I think you --

4 JUSTICE SCALIA: Is that involved in this
5 case? Do we have to decide this for this case?

6 MR. CATTANI: I don't think we need to. I
7 think it's clear --

8 JUSTICE SCALIA: It's another case. It's --

9 JUSTICE KAGAN: Well, the reason I think
10 it's relevant is that if you were to say that there
11 needed to be effective assistance of counsel there, then
12 I would have asked you, what is the difference between
13 this case and that case? So that's the reason it is
14 relevant to this case, because the difference is really
15 just one of just labels.

16 MR. CATTANI: Well, and that's why I think
17 it's more important to -- to assess the inquiry that's
18 being done, whether it's a collateral inquiry as opposed
19 to whether we are labeling it part of the -- the direct
20 appeal or not. And if it is a collateral inquiry, then
21 it makes more sense I think to -- to couch it in terms
22 of this is a collateral review.

23 JUSTICE SCALIA: There seems to me a
24 rational line between collateral attack and attack in
25 the same proceeding. I don't see anything irrational

1 about that. Right?

2 MR. CATTANI: Uh --

3 JUSTICE SCALIA: Yes!

4 MR. CATTANI: Yes, I agree. Yes.

5 (Laughter.)

6 JUSTICE GINSBURG: Would you explain to me
7 why don't we consider this adverse boost to your
8 proceeding, because this post-conviction proceeding, it
9 began -- it began the same time as the direct appeal,
10 but it ended before this case became final.

11 So it was a first -- it was a first tier,
12 because it was decided before the direct appeal.

13 MR. CATTANI: Well, it is a first-tier
14 collateral attack. I would agree that it's the first
15 tier. That's the first time that this issue is raised
16 in a collateral attack. But I don't -- I don't think
17 that's determinative of the issue here.

18 This Court has never -- has never said that
19 every claim that can only be raised for the first time
20 entitles someone to -- to counsel. And that exception,
21 that would -- that would swallow the rule. In Arizona,
22 in most States where the types of claims that can be
23 raised in post-conviction proceedings are generally
24 limited to claims that could not have been raised
25 earlier.

1 So the rule that Petitioner is seeking
2 really would swallow -- the exception would swallow the
3 rule that was announced in -- in Finley -- and
4 Giarratano.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 No, you've got to listen to the government.
7 Mr. Wall.

8 ORAL ARGUMENT OF JEFFREY B. WALL,
9 ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING THE RESPONDENT

11 MR. WALL: Mr. Chief Justice, and may it
12 please the Court:

13 Justices Sotomayor and Kagan, I want to go
14 to your questions about the costs, because there are
15 some very real costs here. We live in a world that is
16 settled and working. Although this Court has drawn the
17 line at the first direct appeal, 47 States, D.C. and the
18 Federal Government provide counsel in a first
19 post-conviction proceeding, either as a right or in the
20 discretion of the trial court as public defender.

21 JUSTICE SOTOMAYOR: 47 States and the
22 Federal Government does?

23 MR. WALL: That's right. So there are 18
24 States that provide it as a right, 29 States and D.C.
25 provide it in the discretion of the trial court and the

1 public defender, and the Federal Government obviously in
2 the discretion of the district courts. And so what
3 Petitioner is doing, by its constitutionalizing that
4 area, is shifting resources to a subset of
5 ineffectiveness claims.

6 CHIEF JUSTICE ROBERTS: Well, it's pretty --
7 it's small comfort to the lawyer who -- declined, who
8 doesn't get one, that everybody else does.

9 MR. WALL: Mr. Chief Justice, I understand,
10 but I think this is an area where States are permitted
11 to draw different lines, and what Petitioner is saying
12 -- take the Federal system, for example. Petitioner's
13 rule would say a Federal prisoner can walk in under 2255
14 and by making an allegation of ineffectiveness, of
15 either trial or appellate counsel, he is entitled to
16 appointed counsel, without even I take it a showing of
17 colorableness.

18 JUSTICE KENNEDY: Well, not if you adopt the
19 -- the one proceeding rule that I think counsel for the
20 Petitioner was suggesting. He suggested Arizona is one
21 of those few States where you could only raise this
22 issue on collateral, and therefore you are entitled to
23 effective assistance of counsel on that trial. And he
24 would stop there, for statistical and for -- reasons,
25 for probability reasons, rather.

1 MR. WALL: I think that is exactly where he
2 would stop. I think it's very difficult to explain why
3 his rule doesn't require him to go further, because by
4 saying the first tier is not a stage of a case, as this
5 Court has always meant it, but it applies claim by
6 claim, and lawyers are going to represent you only on
7 some claims, and you're -- pro se you will file
8 others -- he ends up with two problems.

9 One, he has to concede as he does in his
10 reply brief and as he did in response to Justice Alito,
11 that he is going to say the same thing with regard to a
12 lot of other claims that are typically raised in habeas;
13 and second, he can't find a limiting principle. Because
14 when you come in your second or your third or your
15 post-fourth conviction proceeding, and you say all my
16 previous counsel has been ineffective, that is also the
17 first time that you have been able to say it; and you
18 will be making the same claim: I am entitled to have
19 one constitutionally competent lawyer argue that my
20 trial counsel is ineffective.

21 JUSTICE BREYER: What about not going that
22 far? What about saying in this case -- in this case,
23 Arizona did give him a lawyer. In this case, it was the
24 same lawyer. In this case, the proceeding was filed
25 prior to the completion of the appeal and ended before

1 the completion of the appeal. So for this case, this
2 counts as the one round of proceedings, and therefore,
3 his client can in fact assert that that single
4 individual who was his lawyer was incompetent in those
5 proceedings that ended -- didn't end prior to the
6 termination of the appeal, ended first?

7 MR. WALL: Here's the primary problem with
8 that, Justice Breyer. This Court said in Coleman, and
9 before that in Murray v. Carrier and in
10 Wainwright v. Torna, that if you don't have a Federal
11 constitutional right to counsel and the States or
12 Congress go beyond what they are constitutionally
13 required to do when they give you a lawyer, that
14 performance does not thereby give rise to a due process
15 claim.

16 JUSTICE BREYER: No, but it didn't face the
17 issue of what about a claim that you have a
18 constitutional right to bring up at least once? And
19 this is the first time he was able to bring it up. So
20 in other words, Coleman didn't face this problem. It's
21 as if you couldn't bring up the claim that the judge was
22 sleeping until he got the collateral proceedings. A
23 State could have such a rule -- I don't know why they
24 would, but they could. But if they did, it would be
25 your first chance ever to attack that file process, and

1 so isn't Coleman, in its effort to bar relitigation,
2 actually rather beside the point?

3 MR. WALL: Justice Breyer, I think we just
4 see the case in fundamentally different ways. His first
5 opportunity to raise his trial's ineffectiveness claim
6 was in his first post-conviction proceeding, and he had
7 the opportunity to raise it and his lawyer didn't. And
8 what he's coming in and saying now is not I was deprived
9 of an opportunity to raise it, as in Europe, but I had
10 the opportunity and I didn't --

11 JUSTICE BREYER: No, we are saying it the
12 same way, just as if his lawyer, when he could raise the
13 fact that the judge was sleeping, didn't raise it
14 because he was staring at the ceiling and had been
15 drinking too much. Just as he could raise that point in
16 habeas, because it's his first chance to do it, so he
17 could raise the point that the lawyer, the first time
18 that he had the chance to raise the ineffectiveness of
19 trial counsel, was incompetent, et cetera.

20 MR. WALL: Justice Breyer, I think this case
21 presents a much narrower question, which is, when he
22 comes in, in his second post-conviction proceeding and
23 says although I didn't raise it last time around, I have
24 cause to excuse that default because my lawyer was
25 ineffective. This Court's been clear in three different

1 cases -- that is only cause if he had a constitutional
2 right to counsel in a proceeding that he's pointed to
3 and that he complains about. So the question --

4 JUSTICE SOTOMAYOR: What you haven't told me
5 is a reason why he shouldn't have had effective counsel
6 in the first post-conviction proceeding? I mean, our
7 entire line of cases under Douglas were premised on the
8 fact that defendants would not be or couldn't be charged
9 with the ability to prosecute their claims through
10 direct appeal. Discretionary appeal, we said the
11 likelihood is they could do it on discretionary appeal
12 because they would have a record from below, they would
13 have competent counsel below who would make the best
14 arguments possible, they could then pursue their
15 discretionary appeals because they had something to work
16 with.

17 But if your first chance is to present
18 ineffective assistance of counsel claim is a
19 post-conviction proceeding, you have no record to work
20 with.

21 MR. WALL: That's right. Just so -- I think
22 this is a very different case from Douglas and Halbert,
23 which were grounded in a fairly fundamental equal
24 protection concern, that indigent defendants would be
25 denied a first look -- maybe an only look -- at their

1 convictions and sentences. Here, we're facing something
2 very different. States like Arizona are giving direct
3 appeals; defendants are getting looks at their
4 convictions and sentences, as petitioner did, they're
5 providing post-conviction review.

6 JUSTICE KAGAN: But they didn't -- only the
7 first --

8 MR. WALL: They are even providing lawyers
9 in post-conviction review --

10 JUSTICE KAGAN: Look at the effective
11 assistance claims. So what you say, Mr. Wall, if the
12 Stated did the following -- if it said we are going to
13 take out all Fourth Amendment exclusion claims and we
14 are going to put that in the post-conviction review
15 system, and you know what, there, you are not entitled
16 to an effective lawyer. Would that be all right?

17 MR. WALL: Justice Kagan, I think there are
18 any number of claims, that if a State tried to pull them
19 out of direct appeal and locate them in collateral
20 review, we might be able to say it's then running its
21 obligation under Douglas because those are the types of
22 claims based on a trial record that ought to be -- and
23 always have belonged to direct appeal. The question is
24 did the State act arbitrarily when it takes an
25 ineffectiveness claim. So the only type of claim that

1 the State is trying to relocate into collateral review
2 and --

3 JUSTICE KAGAN: I'm sure the State would not
4 say it was acting arbitrarily in my example. The State
5 would say there is a good reason for it, the Fourth
6 Amendment exclusion claims are disfavored, they have
7 nothing to do with innocence; they involve a kind of
8 fact-intensive inquiry that is better done in a
9 different proceeding. So I think that the State would
10 have many good reasons, but, you know, it's also true
11 that there, you don't get a lawyer.

12 MR. WALL: Justice Kagan, I just -- I think
13 the Court's case law would -- I mean; I think it would
14 be a different question; the Court having said that
15 under Stone, at least in the Federal system, the Fourth
16 Amendment claims can't be raised on habeas because it
17 would be difficult for a State to come in and say they
18 have to be raised in habeas. Here, the Court said in
19 Massaro these claims are best suited to resolution in
20 habeas, and they are claims that are traditionally
21 brought in habeas. And at least for that type of claim,
22 which is the -- I mean, the State's not trying to hide
23 the ball here. All the State has done was take a claim
24 that this Court has said belongs in habeas and say we
25 are putting it in habeas, not in a Federal system where

1 although people can raise it as a practical matter,
2 they're all decided on collateral review -- virtually
3 all of them.

4 It says, we are just going to say people
5 have trouble briefing and raising it and we will
6 relocate it to collateral review, not for ambiguous or
7 arbitrary reasons but for all of the reasons that this
8 Court gave in Massaro. So at least for that type of
9 claim, I think it's permissible under the Fourteenth
10 Amendment leaving for another day whether they could do
11 it with other types of claims -- that I do think
12 probably belong to a direct appeal. And that would
13 present very different constitutional problems if a
14 State started trying to channel them to collateral
15 review, but -- all Arizona has done is pick up on
16 Massaro and say absolutely right, these claims belong in
17 habeas, and that's where we are going to put them.

18 And collateral review --

19 JUSTICE SOTOMAYOR: You have now told me
20 that the vast majority of States, 47 I think is the
21 number you gave -- put this into post conviction, give
22 counsel at post-conviction review. Isn't it an empty
23 promise if what you are giving is incompetent counsel?
24 I mean, Strickland is a very high standard.

25 MR. WALL: Justice Sotomayor, a number of

1 States have found under their own constitution or
2 statutes a right to effective assistance of counsel.
3 But it's a very different matter to say that when States
4 go beyond what the Constitution requires in providing
5 counsel, that counsel's performance thereby gives rise
6 to a due process claim. And again, the courts rejected
7 that in at least three cases, and I think saying that
8 it's cause to excuse a procedural default here without
9 saying that there is some underlying right to counsel
10 would require a ruling in those other cases.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Bartels, you have two minutes remaining.

13 REBUTTAL ARGUMENT BY ROBERT D. BARTELS

14 ON BEHALF OF THE PETITIONER

15 MR. BARTELS: Mr. Chief Justice, let me
16 straighten out one thing -- subtly in the record about
17 the facts. This is not in the record, and I am doing
18 this for my friend's benefit. Harriet Levitt was
19 initially appointed to represent Mr. Martinez on appeal.
20 She then moved to have herself appointed for purposes of
21 a post-conviction review, and it was at a later date,
22 not too much later, that she filed the notice. So at
23 the time the notice was filed, she was officially
24 appointed counsel for purposes of post-conviction
25 proceedings, and the Arizona Court of Appeals stayed

1 their proceedings, which were ongoing. There was a
2 notice of appeal to allow it to continue.

3 The other point that I wanted to get to was,
4 the questions about other States where this -- these
5 claims are handled on direct appeal illustrate a couple
6 of things about our argument: One is, it would be --
7 seem very peculiar to say you have a right to appointed
8 and effective counsel in Wisconsin or Utah on these
9 issues, but not in Arizona, where the label -- that
10 difference is purely label.

11 All these claims, almost all of them,
12 require additional evidence, and that fact makes counsel
13 even more important. Respondents want to say you have a
14 right to counsel on review for almost all claims, but
15 not the one where you need it the most.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 12:06 p.m., the case in the
19 above-entitled matter was submitted.)

20

21

22

23

24

25

A				
ab 10:25	21:6 22:9 33:19 44:10	appeals 1:18 3:12 35:6 37:13	9:19 14:10,11 14:12,15,20	47:18 48:11 51:2
ability 47:9	Alito's 7:10	38:10 47:15	16:9,10,18 17:2	Assistant 1:20
able 16:17 19:20 21:15 44:17 45:19 48:20	allegation 6:2 43:14	48:3 51:25	17:7 18:16,22	assuming 38:9
above-entitled 1:12 52:19	allege 33:16	APPEARANC... 1:15	24:20 29:20,21 30:4,25 31:25	astray 34:1
absence 21:25	allow 27:19 38:23 52:2	appellate 4:13 20:17 21:1,4,16	32:10 34:2 37:18 42:8	attack 35:17,19 35:21 37:19,25 38:16,20 40:24 40:24 41:14,16 45:25
absolutely 10:1 10:14 14:4 32:7 50:16	allowed 29:13,14	21:19 22:4,6,13	51:13 52:6	
abysmally 23:12	allows 5:15	26:7,22 39:22	arguments 9:20 19:23 47:14	attorney 10:21 11:12 26:14 27:21 28:8 29:16 34:6,13 35:14
accept 23:13,17	ambiguous 50:6	43:15	Arizona 1:6,16 1:19 3:10,12,16 5:2 11:3 12:1,9 12:14 20:2,3 24:16 29:12,22 29:24,25 30:6 35:12 36:12 37:21 41:21 43:20 44:23 48:2 50:15 51:25 52:9	authority 27:13 27:17
accommodate 7:12	Amendment 5:18 48:13 49:6,16 50:10	applicable 36:7	Arizona's 3:17 3:22 19:3	authorized 27:7
accomplished 30:16	amicus 1:22 2:11 42:9	application 23:4		automatic 4:15 24:11
act 48:24	analysis 21:14 21:23 22:17,18	applies 44:5	asked 12:9 40:12	available 6:25 30:12
acting 49:4	Anders 23:8,14 23:22 24:4,15	apply 7:20	asking 9:3	a.m 1:14 3:2
additional 26:1,2 35:2 52:12	Ander's 28:23	appoint 4:25 10:23,25 11:11 11:18,25 12:14 13:10,13 25:6 25:10 30:6,15 32:9	assert 26:12 45:3	
address 37:10 39:16	announced 38:3 42:3	appointed 4:17 5:7 10:15 13:16 24:17 27:9,11 27:21 33:25 34:18 35:11 43:16 51:19,20 51:24 52:7	asserted 5:12	B
adequate 30:1 31:12,14	answer 12:8 14:25 18:19 28:12 31:10 38:24	5:7 10:15 13:16 24:17 27:9,11 27:21 33:25 34:18 35:11 43:16 51:19,20 51:24 52:7	assertion 26:13	B 1:20 2:9 8:12 42:8
adopt 43:18	answers 12:13	appointing 30:16	assesses 5:12 21:7	back 18:3 27:6 37:3 39:16,23 39:24 40:1
advanced 25:20 25:22 37:18	anymore 16:8	appointment 9:8	assess 40:17	bad 14:8
advantage 28:3	appeal 3:13,25 7:16 11:9,14,15 12:11 18:22 19:4,6,11,19 19:21,24 20:5,9 20:12,14,18,21 21:11,20 27:9 27:11 29:9,9,15 36:22 37:2,5,20 38:13,23 39:1,2 39:21 40:20 41:9,12 42:17 44:25 45:1,6 47:10,10,11 48:19,23 50:12 51:19 52:2,5	appoints 29:24	assistance 3:18 4:12,15 5:9,24 8:2,9,20 9:5,15 10:20 14:22 15:1 19:12,20 20:8,14,16 22:10,13 23:9 23:15,20,22 25:16 26:10,12 26:23 29:14 30:13 32:16,21 33:16,24 35:14 37:7 39:11,17 40:11 43:23	balancing 22:18 22:21
adverse 41:7		appropriately 37:24		ball 49:23
advised 34:13		approval 27:14		bar 46:1
advocating 15:4 15:7 24:25		arbitrarily 48:24 49:4		Bartels 1:16 2:3 2:13 3:5,6,8 4:21 5:1,5,14 5:25 6:8,16 7:2 7:7,19 8:3,22 9:7,14,22 10:8 10:11,14 11:2 11:13,20,23 12:5,15,18,25 13:3,21 14:13
affidavit 10:22		arbitrary 50:7		
ago 5:20		area 43:4,10		
agree 8:4 9:25 20:7 41:4,14		argue 8:14 16:11 44:19		
agrees 3:17		argued 23:25		
Ah 12:20		arguing 12:17 15:10,11 19:12		
ahead 9:20		argument 1:13 2:2,5,8,12 3:6		
Alito 5:10,22 6:1 8:8 9:3 14:19 15:8 16:25 18:10,14,18				

14:15,23 15:5 15:13,23 16:13 16:22 17:5,13 17:16,23 18:2,6 18:13,17 19:1 19:16,18 20:1,6 20:19,24 21:12 22:12,20 23:6 23:18 24:1,5,14 51:12,13,15 based 9:24 38:20 48:22 bases 8:13 basically 14:12 basis 21:5 22:8 24:7 25:21 Batson 9:12,12 9:16,24 began 41:9,9 behalf 1:16,19 1:22 2:4,7,10 2:14 3:7 24:21 42:9 51:14 believe 7:8 34:25 belong 50:12,16 belonged 48:23 belongs 49:24 benefit 35:7,11 35:12 51:18 best 47:13 49:19 bet 31:25 better 21:24 30:9 34:12 49:8 beyond 5:23 31:16 45:12 51:4 billing 10:16 block 13:17 blocked 16:12,20 32:7,11 33:15 blocks 33:1 board 13:23 boost 41:7 Brady 6:18 7:10 7:25 8:5,5	Breyer 12:7,16 12:20 13:2,6,24 14:14,16 15:7 16:1,14,24 29:19 30:18 31:9,17 32:13 32:18 33:4,8 44:21 45:8,16 46:3,11,20 brief 17:18 23:11 24:4 25:7 28:21 28:23 34:25 44:10 briefing 50:5 briefs 13:8 18:3 23:17 bring 7:17,25 9:5 19:3,14 45:18 45:19,21 bringing 34:19 broken 4:4 brought 49:21 burdens 11:22 <hr/> C <hr/> C 2:1 3:1 8:13 call 37:20 called 31:1 capital 12:3 26:13 27:5 Carpenter 33:16 Carrier 45:9 case 3:4,4,21 4:6 5:8 6:7 8:3 13:1 13:3,11,12 15:4 16:15 17:8 20:4 24:2,4 28:8 34:14 36:2 38:15 40:5,5,8 40:13,13,14 41:10 44:4,22 44:22,23,24 45:1 46:4,20 47:22 49:13 52:17,18	cases 12:3,4 19:25 20:4 26:13,24 27:4,5 28:8 33:1 35:25 36:6,17,17 47:1 47:7 51:7,10 Cattani 1:18 2:6 24:19,20,22 25:4,13 26:2,9 26:18,25 27:4 27:10,18,23 28:6,15 29:1,11 30:9 31:5,15 32:11,14 33:2,6 33:10 34:4,24 35:5,10,16 36:3 36:9,19 37:8,16 38:2,11 39:6,14 40:1,6,16 41:2 41:4,13 cause 13:5 33:17 33:20 46:24 47:1 51:8 caveat 5:15 ceiling 46:14 certain 38:11 certainly 20:17 25:22 27:5 30:14,17 32:12 33:15 35:2 cetera 46:19 challenge 11:7 challenging 22:4 chance 13:15 14:7 45:25 46:16,18 47:17 change 20:7 24:25 25:3 channel 50:14 charged 47:8 CHARLES 1:6 check 10:25 Chief 1:18 3:3,8 9:9,17 19:8,17 19:22 20:3	24:18,22 29:5 42:5,11 43:6,9 51:11,15 52:16 choose 37:20 circuit 39:22 circumstances 8:24 35:4 36:8 claim 3:14 5:9,12 6:4 7:15,25 8:9 8:20 9:10,12,12 9:16,16,24 10:20 11:1 12:22 13:19,25 14:2,2,7,22 15:8 16:5,20 17:1 19:3,14 20:22 21:7,18 22:11 23:10 26:6 29:2 30:6 30:12,21 31:20 31:23 32:22 33:18,23 36:22 41:19 44:5,6,18 45:15,17,21 46:5 47:18 48:25,25 49:21 49:23 50:9 51:6 claimed 10:4 claiming 14:6 31:20 claims 3:11,19 4:12 5:23 8:6 8:10,17,21 10:3 10:23 19:19 20:14 21:4 22:17 23:20,23 25:16,17 26:10 29:3,14 33:13 34:8,15,19 36:14 41:22,24 43:5 44:7,12 47:9 48:11,13 48:18,22 49:6 49:16,19,20 50:11,16 52:5	52:11,14 clarify 27:7 clear 5:20 14:25 40:7 46:25 client 7:17 9:4 13:14 27:14 45:3 client's 27:14 closely 8:10 coincidence 30:22 Coleman 45:8,20 46:1 collateral 12:13 12:23 15:21 16:3 17:9 19:10 29:7,24 30:7,23 31:1,22 35:18 35:19,21 36:18 37:10,19,24 38:14,15 39:9 39:15,15,18 40:18,20,22,24 41:14,16 43:22 45:22 48:19 49:1 50:2,6,14 50:18 colorableness 43:17 come 6:4 9:1 25:9,12,13 44:14 49:17 comes 10:19 13:12 30:24 46:22 comfort 43:7 coming 46:8 competent 44:19 47:13 complains 47:3 completion 44:25 45:1 complicated 5:2 concede 44:9 conceivable 28:4
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

28:25 concern 47:24 concerned 5:8 6:12 concerns 32:8 conduct 39:4 conducted 39:1,3 conducts 39:12 Congress 45:12 consider 41:7 considered 38:7 constitutes 13:5 constitution 51:1 51:4 constitutional 25:19 39:11 45:11,18 47:1 50:13 constitutionality 21:10 constitutionali... 43:3 constitutionally 44:19 45:12 contained 28:18 contest 21:9 context 5:17,19 25:24 continue 52:2 continuing 17:19 continuum 33:3,5 convicted 6:2 12:10 conviction 3:11 4:4 8:7,15 11:7 28:9,21 29:18 38:16,18,20 44:15 50:21 convictions 27:20 48:1,4 correct 4:21 7:2 16:13 18:1,2 20:19 33:10 35:7 36:17 CORRECTIO...	1:7 correctly 36:7 cost 26:4 costs 25:6,8,9,12 26:1,2 42:14,15 couch 40:21 counsel 1:18 3:14,18,23,25 4:12,15,16,16 4:25 5:7,11,17 5:24 6:6 7:15 7:16,17,20,21 7:25 8:2,9,12 8:14,15,18,20 9:3,6,18,23 10:6,16,18,20 10:23,25 11:16 11:19,25 13:5 14:22 15:2,9,12 15:14,17,18,21 15:24,25 16:2,3 16:4,5,16,17 17:7,9 19:12,14 19:21 20:8,17 20:21,22 21:2,4 21:7,9,16,25 22:11,14,14,23 22:24 23:9,15 23:19,20,22 24:10,17,18 25:6,10,17,19 26:5,7,7,22,22 26:22,23 29:13 29:13,23 30:13 30:15,16 32:16 32:17,20,21 33:24 34:1,18 35:7,11,12,18 37:7,11 38:1 39:2,3,12,23 39:25 40:11 41:20 42:5,18 43:15,16,19,23 44:16,20 45:11 46:19 47:2,5,13	47:18 50:22,23 51:2,5,9,11,24 52:8,12,14,16 counsel's 22:4 51:5 count 16:8 counts 45:2 couple 52:5 court 1:1,13 3:9 3:12,15,19 4:11 4:17,24 5:20 18:20 20:13 23:13 24:7,9,23 30:5 32:15 33:12,14,18 35:20 36:20 37:3,4 38:3 39:22,22 41:18 42:12,16,20,25 44:5 45:8 49:14 49:18,24 50:8 51:25 courts 7:11 10:21 24:16 26:16,19 29:25 39:22 43:2 51:6 Court's 14:24 25:1 31:16 46:25 49:13 create 33:2 creating 37:22 credible 26:6 criminal 1:18 3:11 19:15 20:4 critical 21:24 curiae 1:22 2:11 42:9 current 24:14 33:15 <hr/> D <hr/> D 1:16 2:3,13 3:1 8:13 51:13 date 51:21 day 50:10	days 35:1 dealing 5:19 dealt 20:14,17 decide 29:17 40:5 decided 29:3 37:15 41:12 50:2 decides 10:22 19:23 decision 29:12 33:14 decisions 14:24 declined 43:7 default 14:21 33:17,21 46:24 51:8 defendant 5:6 12:10 23:12 29:23 30:2,12 31:19 34:7,8,11 34:15,22 35:2 36:21 defendants 19:15 47:8,24 48:3 defender 42:20 43:1 delayed 29:9 denied 26:20 47:25 Department 1:7 1:21 deprived 46:8 described 34:18 desired 39:7 detailed 10:16 determination 24:16 determinative 41:17 determines 4:17 37:24 develop 39:23 developed 11:17	28:20 developing 35:14 devoted 17:18 diary 28:18 dictate 4:5 difference 38:12 40:12,14 52:10 different 11:3 13:10 16:19 18:24 20:21 25:11 26:21 27:25 35:17 36:7,25 37:23 40:2 43:11 46:4 46:25 47:22 48:2 49:9,14 50:13 51:3 difficult 26:11,11 37:8 44:2 49:17 direct 3:12,25 7:16 18:22 19:4 19:11,13,19 20:5,9,12,14 20:18 21:20 27:9,11,22 28:5 35:21 36:22 37:2,5 38:13,17 38:23 39:1,2,12 39:20 40:19 41:9,12 42:17 47:10 48:2,19 48:23 50:12 52:5 DIRECTOR 1:6 disagreement 22:25 discovered 6:5 6:17 8:1 discovery 7:10 discretion 42:20 42:25 43:2 discretionary 47:10,11,15 disfavored 49:6 distinction 4:2,6
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

35:20 38:5 39:8 district 10:21 43:2 doing 28:3,24 43:3 51:17 Douglas 6:21 8:4 14:25 18:21 21:14 22:21,25 23:1 47:7,22 48:21 draw 17:25 18:5 18:8,15,19 25:24,25 43:11 drawing 39:8 drawn 18:11,23 18:25 35:21 38:5 42:16 drinking 46:15 due 21:23 30:10 30:15 31:7 45:14 51:6 duty 8:23 9:4 24:15 D.C 1:9,21 42:17 42:24	35:18 37:11 effort 46:1 either 30:24 38:15 42:19 43:15 Eldridge 21:23 eliminate 25:15 Emitz 27:19 empty 50:22 encompass 19:19 ended 4:7 41:10 44:25 45:5,6 endless 15:8,12 ends 44:8 enslavement 23:15 entire 47:7 entirely 3:17 entitled 5:7 35:13 36:21 37:6 43:15,22 44:18 48:15 entitlement 38:1 entitles 41:20 equal 47:23 error 21:25 errors 10:4 errs 36:10 especially 4:6 ESQ 1:16,18,20 2:3,6,9,13 essentially 11:11 28:23 39:17 establishes 9:13 et 46:19 Europe 46:9 evaluation 37:4 everybody 43:8 evidence 6:3,17 8:1 20:15,15 28:17 52:12 evidentiary 27:2 38:23 exactly 18:11,22	27:3 35:15 44:1 example 7:21 9:11,15 16:23 22:13 43:12 49:4 exception 32:19 32:24,25 33:1 41:20 42:2 excessive 6:11 6:14 25:8 exclusion 48:13 49:6 exculpatory 6:3 28:18 excuse 13:5 24:10,10,13 46:24 51:8 experience 10:2 explain 41:6 44:2 exponentially 22:7 extends 5:23 extension 25:14 38:3 Extensions 35:3 external 33:20 extraordinary 36:13 extremely 6:12	failure 9:24,24 fair 11:25 31:19 32:10,23 fairly 47:23 far 5:8 22:19 44:22 far-reaching 5:22 fast 37:4 Federal 3:10 4:19 5:1,6,6 6:24 7:1,3,7,11 10:19 14:3 26:16,19 30:5 32:2 33:11,12 42:18,22 43:1 43:12,13 45:10 49:15,25 figure 12:4 file 5:6 19:5 27:8 27:13 28:5,13 34:8,16 44:7 45:25 filed 44:24 51:22 51:23 files 28:22 34:6 filings 27:19 final 19:7 41:10 find 34:7,14 44:13 finds 7:21 fine 17:15 31:24 finished 28:5 Finley 11:17 25:2 25:18 35:19 36:12 38:4,4,8 42:3 first 3:15 4:3,7 4:13,24 6:20 8:7,14 11:12 12:11,23 13:4 15:15,16,21 16:3 17:9,9,25 18:21 19:5 20:25 21:13,21	22:1,22 23:25 24:25 26:7,21 30:21 37:25 38:13,14 41:11 41:11,14,15,19 42:17,18 44:4 44:17 45:6,19 45:25 46:4,6,16 46:17 47:6,17 47:25 48:7 first-tier 3:23,24 7:20 9:8 15:14 18:15 41:13 focus 24:24 follow 10:4 30:19 following 36:10 36:11 48:12 follows 36:13 forever 18:12 forget 16:21 form 11:5,5,5 12:11,12 forth 18:4 found 51:1 Fourteenth 50:9 Fourth 48:13 49:5,15 free 7:13 frequently 29:12 39:20 friend's 29:21 51:18 full 13:15 14:6 fundamental 47:23 fundamentally 46:4 further 29:2 39:4 39:23 44:3
<hr/>				
E				
E 1:18 2:1,6 3:1,1 24:20 earlier 5:13 6:15 21:8 28:10 41:25 easy 26:10 Edwards 33:16 effective 12:18 13:15 14:7 15:1 15:25 24:17 32:16,21 35:13 37:6 39:11,25 40:11 43:23 47:5 48:10,16 51:2 52:8 effectiveness 9:13 15:16,18 21:1,15 22:5				
<hr/>				
F				
<hr/>				
F				
<hr/>				
G				
<hr/>				
G 3:1 General 1:21 generally 27:1 41:23				

getting 48:3 Giarratano 25:2 25:18 32:12 35:20 36:12 38:4,8 42:4 GINSBURG 4:9 4:22 5:4 6:14 7:14,24 9:2 23:3,7,21 24:3 24:9 34:17 41:6 give 5:19 14:25 16:2,3,17 17:11 31:2,3,10,11 31:12,12,13,13 31:21 32:20 33:8 44:23 45:13,14 50:21 given 7:4 12:11 18:7 34:15 gives 32:10 34:6 34:8 51:5 giving 16:8,15 48:2 50:23 go 3:19 4:10 6:25 8:20 9:19 15:15 16:6 18:3,12 22:19,19 23:4 27:6 30:19 34:3 39:16 42:13 44:3 45:12 51:4 goes 16:10 30:14 31:15 going 7:23 11:21 13:9 14:1 15:17 19:19,20,23 21:3,15,17 23:13,17 24:13 25:25 30:5,18 33:5 34:11 37:2 37:4 44:6,11,21 48:12,14 50:4 50:17 good 16:5 30:22 30:23 36:24 49:5,10	gotten 13:16 14:3 government 6:24 42:6,18,22 43:1 grant 34:10 granted 35:4 ground 14:16 32:4 grounded 47:23 grounds 11:6 guess 11:23 30:5 30:18 38:11 39:14 <hr/> H <hr/> habeas 6:25 7:1 13:18 14:3,5 16:11,20 20:23 31:25 32:2,2 33:12 44:12 46:16 49:16,18 49:20,21,24,25 50:17 Halbert 6:21 8:5 14:25 21:14 22:21 47:22 hand 36:2 handle 26:16,19 handled 19:24 35:5 52:5 handles 20:5 happen 29:6 32:2 happened 4:8 29:4,11 37:21 happening 38:19 happens 10:15 12:9 38:25 39:20 happy 19:9 hard 5:16 Harlan 23:1,1 Harriet 51:18 hear 3:3 heard 13:18 hearing 10:24	26:24 27:10 38:24 40:2 hearings 27:2 hide 49:22 high 22:24 50:24 historically 29:13 hold 5:10 10:23 holding 8:3 Honor 4:21 5:14 6:16 7:3,19 8:22 9:7,14,22 10:8,11,14 11:23 12:6,25 13:21 14:13,23 15:13,23 16:22 17:13,16 18:6 18:17 19:1,18 20:1,24 21:12 22:20 23:6 24:5 huge 11:16 hypothetical 7:10 13:23 <hr/> I <hr/> IAC 11:1 38:24 illogical 34:9 illustrate 52:5 implicate 25:1 implicated 26:3 implication 6:21 imply 8:5 important 37:16 38:19 40:17 52:13 impose 25:8 inadequate 17:7 29:23 30:2 31:3 31:21,24 39:4 incompetent 45:4 46:19 50:23 incorrect 22:23 indicate 15:8 indicates 38:22	indication 28:16 indigent 47:24 individual 45:4 ineffective 3:15 3:18 4:12,14 5:9,24 8:2,9,12 8:16,20 9:5,11 9:15,21 10:20 12:24 13:19 14:5,8,21 15:9 15:22 19:12,20 20:8,13,16,22 22:10,13 23:9 23:15,20,22 24:8 25:16 26:8 26:10,12,14,23 29:14 30:12 33:16,23 39:17 44:16,20 46:25 47:18 ineffectively 16:18 ineffectiveness 9:19,23 13:4 32:22 43:5,14 46:5,18 48:25 infinite 17:19 33:3,5 inform 34:19 information 6:4 28:19 initial 8:11 11:15 initially 3:19 51:19 initio 10:25 innocence 49:7 inquiries 39:5 inquiry 40:17,18 40:20 49:8 insistence 3:22 insofar 32:21 instance 29:4 interest 11:17,22 25:2 interests 4:18,23	25:5 intervals 10:10 involve 15:17 49:7 involved 40:4 involves 22:2 irrational 40:25 irrevocably 14:21 issue 3:21 7:20 13:1,2,3,20 16:15,16 21:16 23:16 24:12 28:9,17 29:7 36:2,18,24 37:3 39:1 41:15,17 43:22 45:17 issues 7:21 10:9 10:13,13 23:24 29:18 37:14 39:21 52:9 <hr/> J <hr/> JEFFREY 1:20 2:9 42:8 judge 4:13,13 14:5,9 22:2,6,9 23:4,8,10,11 23:21,23 24:11 24:15 32:2 45:21 46:13 judgment 17:3 judgments 32:5 jurisprudence 25:1 justice 1:21 3:3,8 4:9,18,22,23 5:4,10,22 6:1 6:14,23 7:4,9 7:14,24 8:8 9:2 9:3,9,17 10:3,9 10:12,17 11:10 11:16,21 12:2,7 12:8,16,20 13:2 13:6,24 14:14
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

14:16,19 15:3,6 15:7,7,19 16:1 16:14,24,25 17:2,6,14,23 18:3,10,14,18 19:8,17,22 20:3 20:16,20 21:6 22:9,15,25 23:1 23:1,3,7,21 24:3,9,18,22 25:4,23 26:4,16 26:19 27:3,6,12 27:21 28:2,11 28:22 29:5,19 30:18 31:9,17 32:13,18 33:4,8 33:19 34:17 35:5,15,23,24 35:25 36:5,16 36:23 37:12,22 38:6,7,21,21 39:10,19 40:4,8 40:9,23 41:3,6 42:5,11,21 43:6 43:9,18 44:10 44:21 45:8,16 46:3,11,20 47:4 48:6,10,17 49:3 49:12 50:19,25 51:11,15 52:16 Justices 42:13	15:19 17:2,6,14 35:23,25 36:5 36:16 38:7,21 39:10 43:18 KENT 1:18 2:6 24:20 kind 5:15 8:25 22:18 36:25 49:7 kinds 32:5 know 12:2,2,4,5 12:6 14:12 15:3 15:6 16:9 18:4 25:10,24 28:6 28:11,15 31:4,9 38:22 45:23 48:15 49:10	leave 17:2 leaving 50:10 led 34:1 leg 11:12 lens 30:10 let's 14:16 level 14:24 26:21 Levitt 27:7,10,16 28:12 51:18 lies 18:4 light 6:5 likelihood 47:11 limitation 6:11 7:8 limitations 7:12 17:20 limited 7:16 8:1,4 8:19 9:8 41:24 limiting 15:11 17:3,11 25:21 44:13 limits 15:14 line 17:25 18:4,5 18:5,8,11,15 18:19,23 25:24 25:25 40:24 42:17 47:7 lines 43:11 listen 42:6 litigant 10:19 litigate 19:6 26:11 33:18 litigating 33:13 litigation 17:19 little 5:2 live 42:15 locate 48:19 logical 25:14 38:3 long 30:14 longer 4:23 look 14:5,9 16:2 21:15 24:11 47:25,25 48:10 looked 4:12	looking 21:16 29:2 30:11 looks 48:3 lose 31:3 lot 25:7 32:9 44:12 lower 22:7 LUIS 1:3	minutes 51:12 missing 13:8 mistake 22:3 motion 27:8,13 28:5,14 moved 51:20 Murray 45:9
K	L		M	N
Kagan 17:23 18:3 22:15 25:4 25:23 35:5,15 35:24 36:23 37:12,22 38:6 40:9 42:13 48:6 48:10,17 49:3 49:12 Kagan's 38:21 keep 10:6 keeping 5:16 Kennedy 15:3,6	L 1:6 label 3:20 37:17 52:9,10 labeling 40:19 labels 3:16 40:15 lack 20:15 Laughter 14:18 41:5 law 18:23 49:13 lawyer 8:23 9:17 12:14,17,19,22 12:23 13:15 14:7 16:8 21:19 22:6 29:25 30:2 30:6,8,21,22 31:2,2,10,12 31:20,22,23 33:9 43:7 44:19 44:23,24 45:4 45:13 46:7,12 46:17,24 48:16 49:11 lawyers 13:10,13 14:3 23:2 29:6 32:9 44:6 48:8 leads 14:20		main 4:9 maintained 35:22 majority 27:5 50:20 making 8:19 43:14 44:18 MARIANO 1:3 Martinez 1:3 3:4 19:4 24:2,4 27:19 34:19 51:19 Massaro 5:3 20:13 36:14,19 36:23 37:14 49:19 50:8,16 Mathews 21:22 matter 1:12 16:19 30:7 50:1 51:3 52:19 mattered 23:2 matters 9:6 McKane 18:8 mean 4:11 6:24 10:4 17:24 24:10 39:19 47:6 49:13,22 50:24 meant 44:5 meritorious 8:17 28:9 34:2 merits 17:17,17 21:18 met 30:5 minor 25:3	need 20:15 39:25 40:6 52:15 needed 28:1 40:11 never 14:6,20 31:25 33:5,8 41:18,18 new 8:14 40:2 newly 6:17 7:25 noncapital 27:4 non-capital 12:4 non-record 38:20 non-record-ba... 38:16 normal 32:5 noted 36:20 notice 34:6,6 51:22,23 52:2 notices 11:9 number 11:25 27:25 35:1 48:18 50:21,25
				O
				O 2:1 3:1 object 3:20 objection 9:25 obligated 10:25 11:11,13

obligation 21:9 48:21	particular 30:1 36:2	pointed 47:2	32:22	31:1 34:11
obvious 23:10 26:13	parts 4:5 11:14	points 24:24	prevented 34:1	37:10 38:14,15
obviously 27:13 43:1	pay 7:23 8:23 9:3 10:5	portion 3:24,25	prevents 15:20	39:15,16,18
occurs 38:14	pays 10:12	portions 4:3	previous 15:9	40:25 41:8,8
October 1:10	peculiar 52:7	position 4:2,9 5:5 33:13 34:12	17:7 31:16	42:19 43:19
offered 17:3	pending 19:6	39:24	44:16	44:15,24 46:6
office 20:7	people 16:15 50:1,4	possible 19:19 47:14	previously 6:5 29:15 37:21	46:22 47:2,6,19 49:9
officially 51:23	perceive 29:6	post 8:6,14 28:1 28:9,20 29:18	primarily 25:13	proceedings 4:10 4:14,16 5:13
oh 13:18 14:6 15:9	percentage 12:5	50:21	primary 45:7	14:4 17:4 20:5
okay 14:14 16:8 16:24 31:11	performance 45:14 51:5	post-conviction 3:16,20,23 4:7	principle 15:11 17:4,12 18:24	38:25 39:13
once 9:13 13:22 45:18	period 35:3	8:11 11:8,19	19:2 44:13	41:23 45:2,5,22 51:25 52:1
ones 17:22	permissible 50:9	13:4 15:2,16	principled 25:21	process 21:23 30:10,15 31:7
ongoing 52:1	permitted 7:14 43:10	17:25 18:9 19:5	prior 29:12 44:25 45:5	35:6,9 36:25
opinion 14:11	person 19:22,24 35:6,10 37:6	22:4 23:3 25:15	prisoner 12:10 43:13	37:2,5,13 38:10 45:14,25 51:6
opportunity 4:3 4:24 6:20 8:7	petition 34:16	25:16 26:3,22	pro 10:19 44:7	progeny 11:18
21:3,18,20,21	petitioner 1:4,17 2:4,14 3:7,17	27:8 34:10 35:8	probability 22:2 22:5,23 43:25	promise 50:23
34:8,15 46:5,7	3:22 5:11 8:10	41:8,23 42:19	probably 7:9 14:2-39:1 50:12	proposing 10:18
46:9,10	8:19,21 15:20	46:6,22 47:6,19	problem 18:18 24:7 32:14 33:6	proposition 4:18 5:23 14:20
opposed 38:16 40:18	24:25 33:20,22	48:5,9,14 50:22	33:11 45:7,20	prosecute 27:9 27:11 47:9
oral 1:12 2:2,5,8 3:6 24:20 42:8	42:1 43:3,11,20	51:21,24	problematic 34:5	prosecution 6:2
original 12:8	48:4 51:14	post-fourth 44:15	problems 17:19 44:8 50:13	protection 47:24
ought 48:22	Petitioner's 17:17 43:12	potential 11:1	procedural 21:23 30:10,15 31:7	provide 9:18 21:1,9 31:6
outcome 39:7	petitions 6:11 27:20	potentially 28:9	33:17,21 51:8	42:18,24,25
overcome 33:17 33:20	Phoenix 1:19	practical 17:20 17:21 50:1	procedurally 14:21	provided 6:9 21:11
	pick 50:15	practice 29:15	procedure 34:5 34:18 36:10	provides 6:19 22:8 24:7
	piece 32:3	precede 38:25	procedures 30:11	providing 48:5,8 51:4
P	place 18:14,24 36:11	precedent 32:7 32:12 33:15	proceed 12:12	public 42:20 43:1
P 3:1	pleading 34:9	prejudice 21:17	proceeding 3:16 4:7 5:15 6:9,19	pull 48:18
page 2:2 16:23	please 3:9 24:23 42:12	prejudicial 22:3	8:11,15 15:21	purely 52:10
pages 17:18	pleases 18:8	premised 47:7	17:10 18:1	purposes 51:20 51:24
paper 32:3	point 4:24 5:13 7:12,17 13:14	present 8:7 47:17 50:13	19:13 25:15	pursue 7:22 24:12 34:20
papers 26:20	35:3 46:2,15,17	presents 46:21	26:3 30:23,25	47:14
pardon 26:18 36:1	52:3	presumably 19:13		
part 20:8 37:5,12 37:20 40:19		pretty 43:6		
		prevent 27:24		

pursuing 9:15,16 put 37:17 48:14 50:17,21 putting 36:25 49:25 p.m 52:18	ramifications 4:19 rare 36:20 rarely 22:17 rational 40:24 rationale 36:6 read 32:3 real 42:15 really 7:4 11:6 11:14 22:25 25:20 36:13 38:7 40:14 42:2 reason 10:23 21:13 28:4,7,7 28:12,24,25 40:9,13 47:5 49:5 reasons 36:24 43:24,25 49:10 50:7,7 REBUTTAL 2:12 51:13 recall 34:24 35:1 receive 35:7 received 27:15 35:11 receives 35:12 recognized 20:13 37:14 recommended 36:14 record 27:7 28:16 29:17 35:14 39:23 47:12,19 48:22 51:16,17 record-based 38:17 regard 44:11 regular 35:6 37:13 rejected 25:17 51:6 related 8:10 relating 36:15	relevant 40:10 40:14 reliance 11:17 11:22 25:2 relief 3:11,16,20 8:11,13 11:8 27:8 28:10 34:20 36:21 relieve 32:8 relitigation 46:1 relocate 49:1 50:6 remaining 35:1 51:12 remains 34:23 remand 37:2,6 reply 44:10 represent 8:21 9:4 44:6 51:19 representation 10:6 21:10 represented 23:12 representing 7:17 27:18,24 33:22 request 12:1 35:2 require 4:18,23 11:6 21:17 25:15 44:3 51:10 52:12 required 9:18 45:13 requirement 3:18 33:18 requires 9:16 51:4 resolution 38:25 49:19 resolved 29:10 resources 43:4 respect 3:23 5:8 Respondent 1:19 1:23 2:7,11	24:21 42:10 Respondents 52:13 response 44:10 rest 11:15 result 22:23 27:1 review 3:24,24 4:1,4 5:21 6:19 6:20 7:20 9:8 9:12 12:13,23 15:14,17 16:3 18:16,21 19:10 21:1,3,18,20 22:22 23:22 27:22 28:5 29:7 29:24 30:7 31:1 31:22 35:9,18 35:21 37:25 38:17,17 40:22 48:5,9,14,20 49:1 50:2,6,15 50:18,22 51:21 52:14 reviewing 29:17 reviews 23:11,21 ridiculing 13:25 right 3:22,25 4:10,15 5:11,17 5:18 6:6,22 7:6 7:19 8:19 10:18 12:16,22 13:6 14:1 15:1,8,12 15:24,24 16:14 16:21 18:16 20:18,23 21:6 23:4,19 24:4,17 25:17,19 29:8 29:19 30:8 31:4 31:6,9 32:15,16 32:20 35:15 39:11 41:1 42:19,23,24 45:11,18 47:2 47:21 48:16 50:16 51:2,9	52:7,14 rise 45:14 51:5 risk 21:24 22:1 road 33:21 ROBERT 1:16 2:3,13 3:6 51:13 ROBERTS 3:3 9:9,17 19:8,17 19:22 20:3 24:18 29:5 42:5 43:6 51:11 52:16 Ross 14:25 round 12:11,21 16:6 45:2 routine 29:5 routinely 10:15 11:18,25 25:17 26:17,20 34:14 35:4 rule 15:4,10 25:14,21 28:5 28:13 37:23 41:21 42:1,3 43:13,19 44:3 45:23 rules 6:11 27:19 ruling 51:10 run 7:9 11:3 running 48:20 Ryan 1:6 3:4
R 3:1 raisable 3:12 raise 4:24 7:15 8:11 9:11,19,20 13:20 16:4 19:10,10 20:12 21:4,19 23:8,16 26:10,12,15 28:17 29:8,14 30:12 36:1,1 43:21 46:5,7,9 46:12,13,15,17 46:18,23 50:1 raised 6:15 7:15 21:8 28:1 29:7 29:18 33:23 36:18,22 37:24 39:21 41:15,19 41:23,24 44:12 49:16,18 raises 26:23 raising 32:22 34:2 50:5	ramifications 4:19 rare 36:20 rarely 22:17 rational 40:24 rationale 36:6 read 32:3 real 42:15 really 7:4 11:6 11:14 22:25 25:20 36:13 38:7 40:14 42:2 reason 10:23 21:13 28:4,7,7 28:12,24,25 40:9,13 47:5 49:5 reasons 36:24 43:24,25 49:10 50:7,7 REBUTTAL 2:12 51:13 recall 34:24 35:1 receive 35:7 received 27:15 35:11 receives 35:12 recognized 20:13 37:14 recommended 36:14 record 27:7 28:16 29:17 35:14 39:23 47:12,19 48:22 51:16,17 record-based 38:17 regard 44:11 regular 35:6 37:13 rejected 25:17 51:6 related 8:10 relating 36:15	relevant 40:10 40:14 reliance 11:17 11:22 25:2 relief 3:11,16,20 8:11,13 11:8 27:8 28:10 34:20 36:21 relieve 32:8 relitigation 46:1 relocate 49:1 50:6 remaining 35:1 51:12 remains 34:23 remand 37:2,6 reply 44:10 represent 8:21 9:4 44:6 51:19 representation 10:6 21:10 represented 23:12 representing 7:17 27:18,24 33:22 request 12:1 35:2 require 4:18,23 11:6 21:17 25:15 44:3 51:10 52:12 required 9:18 45:13 requirement 3:18 33:18 requires 9:16 51:4 resolution 38:25 49:19 resolved 29:10 resources 43:4 respect 3:23 5:8 Respondent 1:19 1:23 2:7,11	24:21 42:10 Respondents 52:13 response 44:10 rest 11:15 result 22:23 27:1 review 3:24,24 4:1,4 5:21 6:19 6:20 7:20 9:8 9:12 12:13,23 15:14,17 16:3 18:16,21 19:10 21:1,3,18,20 22:22 23:22 27:22 28:5 29:7 29:24 30:7 31:1 31:22 35:9,18 35:21 37:25 38:17,17 40:22 48:5,9,14,20 49:1 50:2,6,15 50:18,22 51:21 52:14 reviewing 29:17 reviews 23:11,21 ridiculing 13:25 right 3:22,25 4:10,15 5:11,17 5:18 6:6,22 7:6 7:19 8:19 10:18 12:16,22 13:6 14:1 15:1,8,12 15:24,24 16:14 16:21 18:16 20:18,23 21:6 23:4,19 24:4,17 25:17,19 29:8 29:19 30:8 31:4 31:6,9 32:15,16 32:20 35:15 39:11 41:1 42:19,23,24 45:11,18 47:2 47:21 48:16 50:16 51:2,9	52:7,14 rise 45:14 51:5 risk 21:24 22:1 road 33:21 ROBERT 1:16 2:3,13 3:6 51:13 ROBERTS 3:3 9:9,17 19:8,17 19:22 20:3 24:18 29:5 42:5 43:6 51:11 52:16 Ross 14:25 round 12:11,21 16:6 45:2 routine 29:5 routinely 10:15 11:18,25 25:17 26:17,20 34:14 35:4 rule 15:4,10 25:14,21 28:5 28:13 37:23 41:21 42:1,3 43:13,19 44:3 45:23 rules 6:11 27:19 ruling 51:10 run 7:9 11:3 running 48:20 Ryan 1:6 3:4
R 3:1 raisable 3:12 raise 4:24 7:15 8:11 9:11,19,20 13:20 16:4 19:10,10 20:12 21:4,19 23:8,16 26:10,12,15 28:17 29:8,14 30:12 36:1,1 43:21 46:5,7,9 46:12,13,15,17 46:18,23 50:1 raised 6:15 7:15 21:8 28:1 29:7 29:18 33:23 36:18,22 37:24 39:21 41:15,19 41:23,24 44:12 49:16,18 raises 26:23 raising 32:22 34:2 50:5	ramifications 4:19 rare 36:20 rarely 22:17 rational 40:24 rationale 36:6 read 32:3 real 42:15 really 7:4 11:6 11:14 22:25 25:20 36:13 38:7 40:14 42:2 reason 10:23 21:13 28:4,7,7 28:12,24,25 40:9,13 47:5 49:5 reasons 36:24 43:24,25 49:10 50:7,7 REBUTTAL 2:12 51:13 recall 34:24 35:1 receive 35:7 received 27:15 35:11 receives 35:12 recognized 20:13 37:14 recommended 36:14 record 27:7 28:16 29:17 35:14 39:23 47:12,19 48:22 51:16,17 record-based 38:17 regard 44:11 regular 35:6 37:13 rejected 25:17 51:6 related 8:10 relating 36:15	relevant 40:10 40:14 reliance 11:17 11:22 25:2 relief 3:11,16,20 8:11,13 11:8 27:8 28:10 34:20 36:21 relieve 32:8 relitigation 46:1 relocate 49:1 50:6 remaining 35:1 51:12 remains 34:23 remand 37:2,6 reply 44:10 represent 8:21 9:4 44:6 51:19 representation 10:6 21:10 represented 23:12 representing 7:17 27:18,24 33:22 request 12:1 35:2 require 4:18,23 11:6 21:17 25:15 44:3 51:10 52:12 required 9:18 45:13 requirement 3:18 33:18 requires 9:16 51:4 resolution 38:25 49:19 resolved 29:10 resources 43:4 respect 3:23 5:8 Respondent 1:19 1:23 2:7,11	24:21 42:10 Respondents 52:13 response 44:10 rest 11:15 result 22:23 27:1 review 3:24,24 4:1,4 5:21 6:19 6:20 7:20 9:8 9:12 12:13,23 15:14,17 16:3 18:16,21 19:10 21:1,3,18,20 22:22 23:22 27:22 28:5 29:7 29:24 30:7 31:1 31:22 35:9,18 35:21 37:25 38:17,17 40:22 48:5,9,14,20 49:1 50:2,6,15 50:18,22 51:21 52:14 reviewing 29:17 reviews 23:11,21 ridiculing 13:25 right 3:22,25 4:10,15 5:11,17 5:18 6:6,22 7:6 7:19 8:19 10:18 12:16,22 13:6 14:1 15:1,8,12 15:24,24 16:14 16:21 18:16 20:18,23 21:6 23:4,19 24:4,17 25:17,19 29:8 29:19 30:8 31:4 31:6,9 32:15,16 32:20 35:15 39:11 41:1 42:19,23,24 45:11,18 47:2 47:21 48:16 50:16 51:2,9	52:7,14 rise 45:14 51:5 risk 21:24 22:1 road 33:21 ROBERT 1:16 2:3,13 3:6 51:13 ROBERTS 3:3 9:9,17 19:8,17 19:22 20:3 24:18 29:5 42:5 43:6 51:11 52:16 Ross 14:25 round 12:11,21 16:6 45:2 routine 29:5 routinely 10:15 11:18,25 25:17 26:17,20 34:14 35:4 rule 15:4,10 25:14,21 28:5 28:13 37:23 41:21 42:1,3 43:13,19 44:3 45:23 rules 6:11 27:19 ruling 51:10 run 7:9 11:3 running 48:20 Ryan 1:6 3:4
R 3:1 raisable 3:12 raise 4:24 7:15 8:11 9:11,19,20 13:20 16:4 19:10,10 20:12 21:4,19 23:8,16 26:10,12,15 28:17 29:8,14 30:12 36:1,1 43:21 46:5,7,9 46:12,13,15,17 46:18,23 50:1 raised 6:15 7:15 21:8 28:1 29:7 29:18 33:23 36:18,22 37:24 39:21 41:15,19 41:23,24 44:12 49:16,18 raises 26:23 raising 32:22 34:2 50:5	ramifications 4:19 rare 36:20 rarely 22:17 rational 40:24 rationale 36:6 read 32:3 real 42:15 really 7:4 11:6 11:14 22:25 25:20 36:13 38:7 40:14 42:2 reason 10:23 21:13 28:4,7,7 28:12,24,25 40:9,13 47:5 49:5 reasons 36:24 43:24,25 49:10 50:7,7 REBUTTAL 2:12 51:13 recall 34:24 35:1 receive 35:7 received 27:15 35:11 receives 35:12 recognized 20:13 37:14 recommended 36:14 record 27:7 28:16 29:17 35:14 39:23 47:12,19 48:22 51:16,17 record-based 38:17 regard 44:11 regular 35:6 37:13 rejected 25:17 51:6 related 8:10 relating 36:15	relevant 40:10 40:14 reliance 11:17 11:22 25:2 relief 3:11,16,20 8:11,13 11:8 27:8 28:10 34:20 36:21 relieve 32:8 relitigation 46:1 relocate 49:1 50:6 remaining 35:1 51:12 remains 34:23 remand 37:2,6 reply 44:10 represent 8:21 9:4 44:6 51:19 representation 10:6 21:10 represented 23:12 representing 7:17 27:18,24 33:22 request 12:1 35:2 require 4:18,23 11:6 21:17 25:15 44:3 51:10 52:12 required 9:18 45:13 requirement 3:18 33:18 requires 9:16 51:4 resolution 38:25 49:19 resolved 29:10 resources 43:4 respect 3:23 5:8 Respondent 1:19 1:23 2:7,11	24:21 42:10 Respondents 52:13 response 44:10 rest 11:15 result 22:23 27:1 review 3:24,24 4:1,4 5:21 6:19 6:20 7:20 9:8 9:12 12:13,23 15:14,17 16:3 18:16,21 19:10 21:1,3,18,20 22:22 23:22 27:22 28:5 29:7 29:24 30:7 31:1 31:22 35:9,18 35:21 37:25 38:17,17 40:22 48:5,9,14,20 49:1 50:2,6,15 50:18,22 51:21 52:14 reviewing 29:17 reviews 23:11,21 ridiculing 13:25 right 3:22,25 4:10,15 5:11,17 5:18 6:6,22 7:6 7:19 8:19 10:18 12:16,22 13:6 14:1 15:1,8,12 15:24,24 16:14 16:21 18:16 20:18,23 21:6 23:4,19 24:4,17 25:17,19 29:8 29:19 30:8 31:4 31:6,9 32:15,16 32:20 35:15 39:11 41:1 42:19,23,24 45:11,18 47:2 47:21 48:16 50:16 51:2,9	52:7,14 rise 45:14 51:5 risk 21:24 22:1 road 33:21 ROBERT 1:16 2:3,13 3:6 51:13 ROBERTS 3:3 9:9,17 19:8,17 19:22 20:3 24:18 29:5 42:5 43:6 51:11 52:16 Ross 14:25 round 12:11,21 16:6 45:2 routine 29:5 routinely 10:15 11:18,25 25:17 26:17,20 34:14 35:4 rule 15:4,10 25:14,21 28:5 28:13 37:23 41:21 42:1,3 43:13,19 44:3 45:23 rules 6:11 27:19 ruling 51:10 run 7:9 11:3 running 48:20 Ryan 1:6 3:4
R 3:1 raisable 3:12 raise 4:24 7:15 8:11 9:11,19,20 13:20 16:4 19:10,10 20:12 21:4,19 23:8,16 26:10,12,15 28:17 29:8,14 30:12 36:1,1 43:21 46:5,7,9 46:12,13,15,17 46:18,23 50:1 raised 6:15 7:15 21:8 28:1 29:7 29:18 33:23 36:18,22 37:24 39:21 41:15,19 41:23,24 44:12 49:16,18 raises 26:23 raising 32:22 34:2 50:5	ramifications 4:19 rare 36:20 rarely 22:17 rational 40:24 rationale 36:6 read 32:3 real 42:15 really 7:4 11:6 11:14 22:25 25:20 36:13 38:7 40:14 42:2 reason 10:23 21:13 28:4,7,7 28:12,24,25 40:9,13 47:5 49:5 reasons 36:24 43:24,25 49:10 50:7,7 REBUTTAL 2:12 51:13 recall 34:24 35:1 receive 35:7 received 27:15 35:11 receives 35:12 recognized 20:13 37:14 recommended 36:14 record 27:7 28:16 29:17 35:14 39:23 47:12,19 48:22 51:16,17 record-based 38:17 regard 44:11 regular 35:6 37:13 rejected 25:17 51:6 related 8:10 relating 36:15	relevant 40:10 40:14 reliance 11:17 11:22 25:2 relief 3:11,16,20 8:11,13 11:8 27:8 28:10 34:20 36:21 relieve 32:8 relitigation 46:1 relocate 49:1 50:6 remaining 35:1 51:12 remains 34:23 remand 37:2,6 reply 44:10 represent 8:21 9:4 44:6 51:19 representation 10:6 21:10 represented 23:12 representing 7:17 27:18,24 33:22 request 12:1 35:2 require 4:18,23 11:6 21:17 25:15 44:3 51:10 52:12 required 9:18 45:13 requirement 3:18 33:18 requires 9:16 51:4 resolution 38:25 49:19 resolved 29:10 resources 43:4 respect 3:23 5:8 Respondent 1:19 1:23 2:7,11	24:21 42:10 Respondents 52:13 response 44:10 rest 11:15 result 22:23 27:1 review 3:24,24 4:1,4 5:21 6:19 6:20 7:20 9:8 9:12 12:13,23 15:14,17 16:3 18:16,21 19:10 21:1,3,18,20 22:22 23:22 27:22 28:5 29:7 29:24 30:7 31:1 31:22 35:9,18 35:21 37:25 38:17,17 40:22 48:5,9,14,20 49:1 50:2,6,15 50:18,22 51:21 52:14 reviewing 29:17 reviews 23:11,21 ridiculing 13:25 right 3:22,25 4:10,15 5:11,17 5:18 6:6,22 7:6 7:19 8:19 10:18 12:16,22 13:6 14:1 15:1,8,12 15:24,24 16:14 16:21 18:16 20:18,23 21:6 23:4,19 24:4,17 25:17,19 29:8 29:19 30:8 31:4 31:6,9 32:15,16 32:20 35:15 39:11 41:1 42:19,23,24 45:11,18 47:2 47:21 48:16 50:16 51:2,9	52:7,14 rise 45:14 51:5 risk 21:24 22:1 road 33:21 ROBERT 1:16 2:3,13 3:6 51:13 ROBERTS 3:3 9:9,17 19:8,17 19:22 20:3 24:18 29:5 42:5 43:6 51:11 52:16 Ross 14:25 round 12:11,21 16:6 45:

says 9:3 10:19 11:7 16:7 28:23 30:24 34:13 38:7 46:23 50:4 SCALIA 6:23 7:4 10:3,9,12 20:16,20 40:4,8 40:23 41:3 se 10:19 44:7 second 12:21 15:2,22,25 17:11 21:3,13 21:17,19 25:15 26:3,5 27:7 30:22 34:10 44:13,14 46:22 secured 26:5 see 14:6 28:23 40:25 46:4 seek 27:14 seeking 42:1 send 39:22 sending 39:24 sense 4:11 11:4 29:8 33:4 39:20 40:21 sensible 18:14 sensibly 4:4 sent 40:1 sentences 48:1,4 sentencing 26:14 set 7:11 36:7 settled 42:16 sheets 10:6 shift 33:11 shifting 32:14 43:4 short 35:3 shot 31:19 32:10 show 33:23 showing 43:16 shuttle 35:8 significant 24:25 silly 14:10 simple 11:5	12:12 simply 9:18 27:9 39:8 single 45:3 situation 5:1 6:17 6:18 8:25 9:23 22:22 25:11 34:12 Sixth 5:18 sleeping 45:22 46:13 small 43:7 Solicitor 1:20 solution 7:5 somebody 20:4 30:17 32:1 37:23 someplace 18:20 18:25 somewhat 34:9 sorry 8:8 9:9 14:17 16:7 22:14 23:13 34:25 Sotomayor 10:17 11:10,16,21 12:2,8 26:4,16 26:19 27:3,6,12 27:21 28:2,11 28:22 39:19 42:13,21 47:4 50:19,25 sounded 13:25 Spanish 27:16 speak 27:16 specific 34:24 speech 23:8,14 spotted 23:23 Spreitz 29:12 stage 44:4 stand 4:6 standard 50:24 standpoint 31:6 stands 18:23 staring 46:14	start 14:16 started 4:7 50:14 state 3:10 4:5 5:15,21 6:8,8,9 6:10,19,23,25 7:22 8:6,23 9:18 10:5,12,15 10:24 11:11,13 13:12,17 16:3,6 18:7 20:25 21:8 25:5 26:21 30:24 31:21 33:14,18,25 36:6 37:1,15,20 45:23 48:18,24 49:1,3,4,9,17 49:23 50:14 Stated 48:12 statements 10:16 states 1:1,13,22 2:10 7:5,13 11:2,18,22,25 12:6 13:10 20:11 25:10 32:8 37:1 38:22 41:22 42:9,17 42:21,24,24 43:10,21 45:11 48:2 50:20 51:1 51:3 52:4 State's 25:2 49:22 stating 11:6 statistical 43:24 statistics 22:16 27:1 statute 7:8,9,12 statutes 6:10 51:2 stay 29:15 39:16 stayed 51:25 sticking 22:12 sticks 26:1 Stone 49:15	stop 7:6 43:24 44:2 stops 39:25 straight 6:25 straighten 51:16 strange 39:5,13 strategic 28:13 28:24,25 Strickland 50:24 strict 6:12 structure 37:15 submit 10:16,21 submitted 52:17 52:19 subset 43:4 substance 4:8 substantive 11:6 subtly 51:16 succeed 22:17 sufficiently 22:24 suggested 43:20 suggesting 39:7 39:10 43:20 suggestion 39:14 suited 49:19 summary 24:6 supplementary 39:13 supporting 1:23 2:11 6:4 42:10 suppose 36:25 supposed 16:4 Supreme 1:1,13 sure 36:9 49:3 Surely 9:12 surprising 30:3 sustainable 26:6 swallow 41:21 42:2,2 system 4:20 5:2 5:6 7:3,7 10:15 10:19 19:2,9,15 24:15 26:21 43:12 48:15	49:15,25 <hr/> T <hr/> T 2:1,1 tactical 28:3,7 take 13:22 20:21 43:12,16 48:13 49:23 takes 48:24 talk 25:7 33:14 talking 8:25 12:20,21 17:10 24:1 Tempe 1:16 termination 45:6 terms 21:13 40:21 terrible 13:16 Thank 24:18 42:5 51:11 52:16 theoretical 14:24 17:18 theoretically 18:7 theory 10:24 15:14 25:19 35:22 thing 7:6 20:10 44:11 51:16 things 5:16 7:18 11:24 20:24 37:15 38:9 52:6 think 5:18 6:20 7:2 9:1,3,7 11:2 14:24 15:23 16:22 21:22 23:2,18 25:13 25:20 26:9 27:5 27:23 29:3,8 30:9 31:5,15,18 32:11 33:2 34:4 34:9 35:16,17 35:17,19,20 36:3,10,19 37:9
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

37:10,16 38:2,6 38:18 39:6 40:2 40:3,6,7,9,16 40:21 41:16 43:10,19 44:1,2 46:3,20 47:21 48:17 49:9,12 49:13 50:9,11 50:20 51:7 thinking 32:4 thinks 29:23 third 44:14 thought 13:7 23:11 28:1 29:1 30:1 three 24:24 46:25 51:7 threshold 9:19 tier 15:15 18:21 21:13,14 22:22 26:7 41:11,15 44:4 time 5:16 10:6 22:1,3 34:17,22 34:23,25 35:2,3 36:12 39:24 41:9,15,19 44:17 45:19 46:17,23 51:23 timing 38:12,18 told 47:4 50:19 tolerable 29:3 34:7,14 Torna 45:10 track 5:16 traditionally 49:20 transcript 24:6 treat 11:14 trial 3:14,15,18 3:19 4:13 5:9 5:17,19,24 8:12 8:16 9:25 10:5 14:7,9 15:18 16:5 19:24 22:2	22:5,9,11,14 23:4,7,11,20 24:6,7,9,11,15 26:23 29:6,22 29:23 30:1,13 30:22 31:20 32:23,24 33:24 35:18 37:3,3,11 39:23 42:20,25 43:15,23 44:20 46:19 48:22 trial's 46:5 tried 48:18 tries 30:20 trouble 50:5 true 20:2 49:10 Try 35:24 trying 49:1,22 50:14 Tuesday 1:10 turn 6:3 17:21 two 4:3,5 11:24 13:22 20:24 44:8 51:12 type 23:8 34:12 48:25 49:21 50:8 types 19:25 41:22 48:21 50:11 typically 44:12	untethered 33:13 unusual 29:16 unworkable 19:11 upheld 24:16 urging 4:14,19 usual 20:4 usually 19:13,24 Utah 52:8	wanted 28:17 52:3 wants 7:22 8:10 12:22 30:2,19 Washington 1:9 1:21 Wasn't 27:8 way 11:3,8,15 30:14 37:13,15 46:12 ways 11:3 27:25 30:13 46:4 went 33:21 we're 7:22 25:25 48:1 we've 6:17 38:4 wherewithal 18:7 win 14:1 31:25 33:5 winning 14:11 Wisconsin 52:8 wish 7:13 wished 5:6 withdrawing 36:24 won 33:24 wondering 22:15 25:7,9 words 45:20 work 10:17,18 19:2 47:15,19 working 42:16 works 9:10 21:23 world 42:15 worrying 32:9 worse 19:15 wouldn't 4:10,20 5:24 6:6 8:1 23:12,13 wrong 16:12 22:6 22:6,10 32:6 36:17	Y Yeah 16:24 years 5:20 6:1 Z zealously 9:4 zero 14:17 1 10-1001 1:5 3:4 100 5:20 13:16 102 14:3,3 11:05 1:14 3:2 12-minute 10:10 12:06 52:18 18 42:23 19 13:18,19 14:8 2 2011 1:10 2255 4:10,14,16 4:22 5:7 8:6 43:13 24 2:7 24-B 11:5 29 42:24 3 3 2:4 32 27:13 28:5,13 4 4 1:10 42 2:10 47 42:17,21 50:20 5 51 2:14
U Uh 41:2 unable 34:7,14 underlying 51:9 understand 6:16 9:10 12:7 13:7 15:19 17:8 18:10 27:15 38:24 43:9 understood 17:24 United 1:1,13,22 2:10 42:9	V v 1:5 3:4 21:23 33:16 45:9,10 valid 23:23 variety 39:21 various 10:9 vast 50:20 versus 38:4 viable 23:16 victim's 28:18 view 4:25 13:14 16:16 18:15 30:4 32:7 viewed 30:10 views 28:8 violation 6:18 7:11 virtually 50:2 W Wainwright 45:10 walk 43:13 Wall 1:20 2:9 42:7,8,11,23 43:9 44:1 45:7 46:3,20 47:21 48:8,11,17 49:12 50:25 want 5:10 8:14 9:5 12:12 14:11 15:3,6 17:14 29:20 30:21 31:4 34:20 42:13 52:13	X x 1:2,8		